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**HARVARD LAW SCHOOL
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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF
STATE OF IDAHO.

By SOL. HASBROUCK.
(Ex-officio Reporter.)

VOLUME 6.

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For the benefit of the State of Idaho.

Rec. Dec. 21, 1903.

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CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF IDAHO.

(January 24, 1898.)

BROWN v. BRYAN.

[51 Pac. 995.]

TRUST DEED A MORTGAGE UNDER STATUTES OF IDAHO.—A trust deed executed to secure a given debt, payable at a specified time, upon real estate, is, under the statutes of Idaho, a mortgage; and cannot be foreclosed by notice and sale, under a power of sale in such trust deed; and such trust deed can only be foreclosed by judicial sale, pursuant to decree rendered in an action brought therefor in the proper court.

(Syllabus by the court.)

APPEAL from District Court, Blaine County.

Brown & Henderson, for Appellant.

If a deed absolute upon its face be in truth a mortgage, the title still remains in the mortgagor; no right of possession is given the mortgagee under such a deed—it still is a lien. (*Kelley v. Leachman*, 3 Idaho, 392, 29 Pac. 849.) The statutes of Idaho not only provide that there shall be no other method of foreclosure, except that in a court, and the decree of a court (section 4520), but also provide that any contract for forfeiture of property subject to a lien in satisfaction of a debt secured thereby, and any contract in restraint of the right of a redemption form a lien, are void (section 3334). A deed of trust to secure the payment of indebtedness is a mortgage in nearly all the states, whatever the ruling of the state may be as to power of sale. (*Shillaber v. Robinson*, 97 U. S. 68; (argument of Dil-

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Argument for Respondents.

lon, J.); 2 Am. Law. Reg., N. S., 648-650, and cases cited; *Eaton v. Whiting*, 3 Pick. 484; *Dubuque Bank v. Weed*, 57 Fed. 513; *Pickett v. Forbes*, 36 Fed. 514; *Union Bank v. Kansas City Bank*, 136 U. S. 223, 10 Sup. Ct. Rep. 1013; *Dupee v. Rose*, 10 Utah, 305, 311, 37 Pac. 567; disapproving *Koch v. Briggs*, 14 Cal. 257, 73 Am. Dec. 651.) Where states have provided a statutory foreclosure, as the method of exercising the power, such statute excludes all other forms—excludes private sales, and the statute must be strictly followed and the power can only be exercised in statutory manner. (*Shillaber v. Robinson*, 97 U. S. 68; *Grover v. Fox*, 36 Mich. 461; *Lee v. Mason*, 10 Mich. 403; *Sanford v. Flint*, 24 Mich. 26; *Mowry v. Sanborn*, 68 N. Y. 160; *McDonald v. Kellogg*, 30 Kan. 170, 2 Pac. 507.) In many other states they have held that any contract contained in the same instrument by which the money is borrowed to shorten or change or diminish or abolish the equity of redemption, is absolutely null and void. (*Lawrence v. Trust Co.*, 13 N. Y. 200; *Ingle v. Culbertson*, 43 Iowa, 265; *Woodruff v. Robb*, 19 Ohio, 216; *Waters v. Randall*, 6 Met. 479, 484; *Pugh v. Davis*, 96 U. S. 337; *Jackson v. Lawrence*, 117 U. S. 681, 6 Sup. Ct. Rep. 915.)

Kingsbury & Parsons and Johnson & Johnson, for Respondents.

On the presentation of this cause, upon the former hearing, no argument was made by plaintiff's counsel upon the question of the right to foreclose at trustee's sale. It seemed to be taken for granted by both parties that the decision of the supreme court of the United States in the case of *Bell Silver etc. Min. Co. v. First Nat. Bank*, 156 U. S. 470, 15 Sup. Ct. Rep. 440, and the decisions in adjoining states, whose statutes governing the question are identical with ours, settled the question. The California court, in *Bateman v. Burr*, 57 Cal. 483, says: "The instrument annexed to the complaint and marked exhibit 'D' is a deed of trust which authorizes the trustees therein named to sell and convey the lands described, upon default in the payment of the note or interest, and it is not a mortgage requiring judicial foreclosure." (*Koch v. Briggs*, 14 Cal. 256, 73 Am. Dec. 651; *Fogarty v. Sawyer*, 17 Cal. 589.)

Statement of Facts.

For some years prior to September 22, 1888, George W. Venable, George V. Bryan, and George H. Roberts had been mining partners, each owning one-third in the Red Elephant and other mining properties, described in the complaint. On the said date the partners met and effected a settlement of previous accounts, which had been kept in such a manner that it was difficult to tell how much each had advanced, each had drawn, and how much each was debtor or creditor of the firm. This settlement culminated in the following agreement, to wit:

"Whereas, the undersigned, George H. Roberts, George V. Bryan, and George W. Venable, are mining partners and working the Red Elephant group of mines, in Mineral Hill mining district, in Alturas county, Idaho territory, and have been so working said mine for some time past; and whereas, for the purpose of carrying on the work of said mine, and the payment of the debts of said partnership, said George W. Venable has advanced to said company, on May 1, A. D. 1888, the sum of five thousand (\$5,000) dollars, bearing interest at the rate of six per cent per annum: Now, in consideration of the premises, it is mutually agreed, by and between said parties, that the said George W. Venable shall be paid out of the first proceeds of said mine the sum of \$5,000, with the interest as aforesaid, and the same shall be so paid him as the same accrues. And the said Bryan and Roberts hereby transfer and assign to said Venable the proceeds of said mine until the said \$5,000, and interest shall be fully paid. And it is further agreed on the part of said Venable that said Roberts and Bryan shall each have the right to draw from the proceeds of said mine \$200 per month, until a further agreement is made by and between the parties hereto. And it is further agreed that the said Roberts shall, at this time, draw the sum of \$500, the same to be on account of said \$200 per month, he to receipt for the same as such; such amounts, to be so drawn by said Bryan and Roberts, to be charged to them against their respective interest in said mines. It is further understood and agreed that, after the said sum of \$5,000 shall have been fully paid and liquidated, the proceeds of said mines, after deducting the monthly dividend to be paid to said Bryan and Roberts as herein provided, shall be placed

Statement of Facts.

in a fund for the purpose of the future operation of said mines, to be used for the erection of machinery or otherwise, as the said parties may agree. And it is understood and agreed, by and between the parties hereto, in adjustment of the several amounts due from the partnership to the several members thereof, that there is due George W. Venable, in addition to the said sum of \$5,000 above mentioned, the sum of \$5,664.18, moneys advanced by him for the use of said partnership, and it is agreed that the same shall bear interest at the rate of six per cent per annum from November 1, 1887; and that there is due George H. Roberts from said partnership, for moneys advanced by him for the use of said partnership, the sum of fifteen hundred dollars (\$1,500) dollars, which it is agreed shall bear interest at the rate of six per cent per annum from November 1, 1887. And this arrangement and agreement shall be in full adjustment and settlement of all past accounts between said parties, and shall form the basis of new accounts from this date forward. In witness whereof the said parties have hereunto set their hands this twenty-second day of September, A. D. 1888.

(Signed) "GEO. H. ROBERTS.

(Signed) "GEO. W. VENABLE.

(Signed) "GEO. V. BRYAN.

"Witness: (Signed) LYTTLEON PRICE."

It will be seen, by the terms of this agreement, that the claim of \$5,000, which is admitted to be what is termed the "Stevenson claim," was to be paid out of the first proceeds of the mine. After this amount was settled, it was agreed that Roberts and Bryan were each to receive \$200 per month, until a further agreement is made between the parties; and after the said sum of \$5,000 was paid, and after deducting the monthly dividends to be paid to said Bryan and Roberts, the proceeds of the mine were to be placed in a fund for the future operation of said mines. It was also agreed that there was due the said mining partners as follows: To George W. Venable the sum of \$5,664.18, and to George H. Roberts the sum of \$1,500; both of which sums were to bear interest at the rate of six per cent per annum from November 1, 1887. This agreement is dated September 22, 1888. The said mine, or a portion thereof, was

Statement of Facts.

then, on the 24th of September, 1888, leased to George V. Bryan aforesaid. On the twenty-fifth day of January, 1889, the said George H. Roberts gave a trust deed to Frank Taylor, of Hailey, Idaho, for the benefit of the First National Bank of Hailey, party of the third part, to secure the payment of the sum of \$1,500 on the twenty-fifth day of July, 1889, upon the following property, to wit: The Red Elephant lode, the Queen Fraction lode, the Caledonia lode, the O. K. claim, and the Red Elephant, Central, Queen Fraction, and Caledonia mill sites, describing the same. Said trust deed contained a power of sale, which authorized the holder of said trust deed and promissory note given said bank for said money, in case of default of payment of the same, to sell said property at public sale, after advertising the said sale by publishing the time and place of the same, with description of the property, for three weeks, in some newspaper published in the county where said property is situated, and authorizing the holder of said note, or his assigns or agent, to become the purchaser of said property. On the twentieth day of July, 1889, the First National Bank of Hailey sold and transferred all its interest in said note and trust deed to J. H. Moore, of the city of New York. The said Moore was the agent of the said George W. Venable; acted for and was his agent in the purchase of said note and trust deed, and all his subsequent proceedings with relation thereto; and from first to last acted under the direction of the said Venable in all things, and had no personal interest in said trust deed, nor in the purchase of the property therein described. On the seventeenth day of August, 1889, the trustee, Frank Taylor, after giving notice as required by the terms of said deed, exposed for sale and sold, at public auction, the property therein described, and now in controversy in this cause, to J. H. Moore, who was, in all the proceedings, the agent of George W. Venable, as aforesaid; and the said Frank Taylor conveyed to said Moore, on the twenty-sixth day of August, 1889, the said property. The sale of the mining property under trust deed was attended by W. H. Watt, who was also the agent of G. W. Venable, and under Venable's instruction, purchased the property for Venable in the name of Moore, and his fee of \$100 for his service was charged

Opinion of the Court—Morgan, C. J.

to the Red Elephant Mining Company—that is, the partnership of G. V. Bryan, G. W. Venable, and G. H. Roberts, mining partners, in the same property—and said fee was paid by G. V. Bryan by check, signing himself as "Supt.," meaning superintendent of said Red Elephant Mining Company. In March, 1889, a short time before G. W. Venable purchased the trust deed from the First National Bank, Venable testifies that he received \$1,550 from the Red Elephant Company—that is, from Bryan, Venable, and Roberts (sent him by said G. V. Bryan)—which he credited to the company on his books. The purchase of the trust deed was made by Venable through his said agent, Moore, from the First National Bank of Hailey, on July 20, 1889. On June 29, 1889, the said G. W. Venable charged the Red Elephant Company with \$1,000; and July 27th, seven days after purchase of trust deed, said Venable charged said company with \$558.25, being in all \$1,558.25, the amount Venable paid for the trust deed against Roberts. The evidence further shows that, by direction of Venable, Moore transferred the interest so acquired from Roberts to himself and G. V. Bryan. On the thirteenth day of February, 1890, the plaintiff in this case, having before that acquired from said Roberts all his interest in the said Red Elephant Mining Company's property, tendered to Frank Taylor, trustee as aforesaid, the sum of \$1,900, being amount due on said trust deed, with interest, and all costs and expenses attending the execution of said trust, and demanded a deed from said Taylor of the said Red Elephant Company's mining property. This tender was made for the purpose of redeeming said property from the sale made on the seventeenth day of August, 1889.

MORGAN, C. J. (After Stating the Facts).—In the view we take of this case, there is no necessity of determining whether the trust deed given to the First National Bank of Hailey can be foreclosed by notice and sale, as was done in this case, or whether it must be foreclosed by suit, as seems to be required by sections 4520 and 4523 of the Revised Laws of Idaho. I may say, however, that this court has repeatedly decided that a deed absolute on its face, and a contemporaneous contract for reconveyance upon payment of amount due grantee—that is,

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an article of defeasance—although in a separate paper, constituted a mortgage, and must be foreclosed, as by section 4520 et seq. is required. (*First Nat. Bank v. Williams*, 2 Idaho, 670, 23 Pac. 552; *Kelley v. Leachman*, 3 Idaho, 392, 29 Pac. 849, and cases there cited; *Wilson v. Thompson*, 4 Idaho, 678, 43 Pac. 557.) If a deed absolute, with a contract of defeasance on a separate paper, is a mortgage, upon what ground can it be said that a trust deed, which repeatedly recites that it is given to secure an indebtedness, with a clause of defeasance in the instrument itself, is not a mortgage? Notwithstanding the authorities that are and may be cited to sustain the contrary doctrine, I am constrained to say that this court cannot be a party to setting aside a plain and positive statute by judicial decision. Considerable space in the brief of respondent is occupied in showing, by argument and authority, that one member of a mining partnership may buy out the interest of his copartner in the property with his own money, and hold, retain, and own it in his own right, and the mining partnership continue in the management and working of the mine. There can be no doubt of the correctness of this proposition. This court has so decided, substantially, in the case of *Hawkins v. Mining Co.*, 3 Idaho, 241, 28 Pac. 433; but to claim that, therefore, one partner has the right to use the partnership funds on his own motion, without authority of the other partners, to purchase an outstanding mortgage or trust deed given by his copartner upon the mining property, cause it to be foreclosed by notice and sale, to be bid in in the name of his agent, and then transferred to himself or to himself and another partner, and thereby obtain title in himself, is a *non sequitur*.

On September 22, 1888, Roberts, Venable, and Bryan agree, *inter alia*, that Roberts shall be paid \$200 per month until the parties otherwise agree. In April, 1889, Venable, defendant herein, ordered Bryan to cease paying Roberts the \$200 per month, which was accordingly done. Each of the parties, Bryan, Roberts and Venable, owned one-third interest in the property. Therefore each had equal authority in the management of the mine and its proceeds. Venable had no more authority to stop this payment, without agreement of the others,

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than Roberts alone would have had to order its beginning. (*Hawkins v. Mining Co., supra.*) That he was a larger creditor of the partnership than was Roberts gave him no more authority, in the absence of legal proceedings, than Roberts. The money due Roberts then accumulated until the purchase of this trust deed, which was July 20, 1889. On March 18, 1889, by direction of Venable (as shown by the books kept by Venable with the mining partnership), the sum of \$1,500 was sent to him from the proceeds of the mine. This was after the Stevenson indebtedness had been paid in full. Roberts then had as much right to direct Bryan to pay this money to him as had Venable to require it to be paid to himself. If it had been paid to Roberts, he could have taken up the trust deed. On June 20, 1889, Venable used this money to buy up the Roberts deed. At least, Venable charges the firm, Roberts, Bryan and Venable, with the money used to buy the trust deed. The account kept by Venable's bookkeeper, by direction of Venable, and the latter's testimony, shows it was so charged—\$1,000 on June 29 and \$558 on July 27, 1889. The mine then purchased the trust deed against Roberts, and the latter had as much right to control the funds of partnership as Venable. In our opinion, the funds of the partnership having purchased the trust deed, the title is held in trust for the benefit of Roberts or his grantee. Venable then directed Moore to foreclose the trust deed by notice and sale, bid the property in, and afterward transfer it to himself and George V. Bryan, the mining partner; all of which with all due diligence, Moore obediently did. That the purchase of the trust deed was made with the money of the firm, and afterward foreclosed in the interest of Venable and by his direction, was apparently concealed from Roberts until the transaction was fully completed. Now this court is asked to approve of this method of acquiring the property of the mining partner. The court cannot be made a party to such proceeding. This court holds that, upon the showing made, the transfer to Bryan and Venable, respondents, of the mining property described in said deed, should be set aside and held for naught, and the interest therein attempted to be conveyed be decreed to be the property of the plaintiff herein.

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The only question submitted to this court by the appellant is, "Can one partner take the funds of the partnership, go out and buy a deed of trust of the interest of his copartner, foreclose it secretly, bid it in, and hold title to the whole?" This question is sufficiently answered in the opinion. The order of the court below, overruling plaintiff's motion for new trial, is reversed, and a new trial ordered upon the issues formed by the pleadings. costs awarded to appellant.

Huston and Sullivan, JJ., concur.

ON REHEARING.

(Jan. 24, 1898.)

QUARLES, J.—The opinion delivered in this case on the former hearing was set aside on petition for rehearing filed by the respondent, in which petition it was urged that the statement of facts prepared by Mr. Chief Justice Morgan on the former hearing, is incorrect, and not sustained, in some particulars, by the evidence in the record. (See former opinion, 5 Idaho, 145, 51 Pac. 996.) The question whether a trust deed given as security for a debt can be foreclosed by notice and sale, without an action of foreclosure, commenced and prosecuted in the proper court, was not argued by the appellant, and only briefly by the respondents, on the former hearing. But since granting the rehearing both parties have filed additional briefs, in which this question, which we think is the controlling one in this case, is fully discussed; and on the present hearing this question has been very ably and elaborately discussed. We now proceed to the consideration of this question, which must be determined by the statutes of our state. The foreclosure of a trust deed by notice and sale, under power given in the deed, is, in the absence of statutory provision forbidding it, unquestioned.

We quote the following sections of the Revised Statutes of Idaho:

"Sec. 3325. A lien is a charge imposed in some mode other than by a transfer in trust upon specific property by which it is made security for the performance of an act."

"Sec. 3327. A general lien is one which the holder thereof is entitled to enforce as a security for the performance of all the

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obligations, or all of the particular class of obligations, which exist in his favor against the owner of the property.

"Sec. 3328. A special lien is one which the holder thereof can enforce only as security for the performance of a particular act or obligation, and of such obligations as may be incidental thereto."

"Sec. 3333. Notwithstanding an agreement to the contrary, a lien, or a contract for a lien, transfers no title to the property subject to the lien.

"Sec. 3334. All contracts for the forfeiture of property subject to lien, in satisfaction of the obligation secured thereby, and all contracts in restraint of the right of redemption from a lien, are void."

"Sec. 3350. Mortgage is a contract by which specific property is hypothecated for the performance of an act without the necessity of a change of possession."

"Sec. 3353. Every transfer of an interest in property other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by an actual change of possession, in which case it is to be deemed a pledge.

"Sec. 3354. The fact that a transfer was made subject to defeasance on a condition, may, for the purpose of showing such transfer to be a mortgage, be proved (except as against a subsequent purchaser or encumbrancer for value and without notice), though the fact does not appear by the terms of the instrument."

The foregoing sections are parts of title 12 of the Civil Code, under the general subject of "Liens."

Section 4520 of the Revised Statutes, which is a part of the Code of Civil Procedure, is as follows: "There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter. In such action the court may, by its judgment, direct a sale of the encumbered property (or so much thereof as may be necessary) and the application of the proceeds of sale to the payment of the cost of the court and the expenses of the sale,

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and the amount due to the plaintiff; and sales of real estate under judgments of foreclosure of mortgages and liens are subject to redemption as in the case of sales under execution; and if it appear from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt, and it becomes a lien on the real estate of such judgment debtor, as in other cases on which execution may be issued."

Section 4523 of the Revised Statutes, is as follows: "A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale."

The foregoing sections of our statute must be considered and construed together in determining the question before us, which is one of remedy. In construing these statutes, it is the duty of the court to give effect to all of them, and to carry out the general policy and evident intent of all of said statutes, when considered together. We must so construe them, if possible, that effect will be given to each one, and to every part of each one, without nullifying a single provision in either one of them. Mr. Sutherland, in his work on Statutory Construction, at section 288, gives the proper rule, in the following language: "Where enactments separately made are read *in pari materia*, they are treated as having formed in the minds of the enacting body parts of a connected whole, though considered by such body at different dates, and under distinct and varied aspect of the common subject. Such a principle is in harmony with the actual practice of legislative bodies, and is essential to give unity to the laws, and connect them in a symmetrical system. Such statutes are taken together and construed as one system, and the object is to carry into effect the intention. It is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions. For the purpose of learning the intention, all statutes relating to the same subject are to be compared, and, so far as still in force,

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brought into harmony, if possible, by interpretation, though they may not refer to each other, even after some of them have expired or been repealed. An amendatory act and the act amended are to be construed as one statute, and no portion of either is to be held inoperative, if it can be sustained without wresting words from their appropriate meaning. Where a statute is made in addition to another statute on the same subject, without repealing any part of it, the provisions of both must be construed together." In construing our statutes, *supra*, it is manifest to us that, in enacting said statutes, it was clearly the intention of the legislature to declare—first, that a contract "by which specific property is hypothecated for the performance of an act," especially the payment of a debt, shall be regarded and treated as a mortgage; and, second, that a lien given under such contract should be enforced or foreclosed in one manner only, to wit, by an action brought in a proper court, under the provisions of section 4520, *supra*.

But it is contended by the respondent that the trust deed in question, executed by George H. Roberts as party of the first part, to Frank H. Taylor, trustee (or, in event of his death or removal from Idaho, the acting sheriff of Alturas county to become such trustee), party of the second part, securing a debt of \$1,500 from said grantor, Roberts, to the First National Bank of Hailey, the party of the third part, is not subject to the operation of the statutes quoted *supra*, and that same is exempted from the operation of said statutes by reason of the peculiar wording or phraseology of sections 3325 and 3353, *supra*. This contention we do regard as correct. In enacting each and all of said statutes, the legislature was prescribing rules to govern all liens created by contract between creditors on the one side and debtors on the other, by which property is set apart as security for the payment of debt, or hypothecated for the performance of an act, and providing the remedy for the enforcement of the right, or lien of the one party as against the other. The trust deed in question here hypothecated the real estate in controversy, as security for the payment to the bank of the debt therein named. It expressly provides: "These trusts shall be and continue as security to the party of the third part; and

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its assigns, for the repayment, in gold coin of the United States, of the moneys so borrowed by the said party of the first part, and the interest thereon." It then provides that, in case default is made in the payment of the sum so borrowed by the grantor, the trustee therein named might advertise the property so hypothecated for sale, at least once a week for three weeks, in some newspaper published in the county where said property is situated, and sell same at public auction for cash, to the highest bidder therefor, applying so much of the proceeds as necessary to the payment of said debt, interest, and costs of sale. This deed is, in effect, a mortgage. It is in the nature of a mortgage. Under the definition of "mortgage" given in section 3350, *supra*, it is a mortgage, and must be so regarded. It is not such a transfer (in trust) as is contemplated by the legislature in sections 3325 and 3353. The instruments which the legislature evidently had in contemplation, and intended to exempt from the operation of the statutes cited *supra*, were such as create trust, but at the same time absolutely convey the title from the grantor, thus doing something more than the mere hypothecation of property for the payment of debt. A deed of trust, conveying absolutely and irrevocably the title of the grantor, is exempted from the operation of said statutes. For instance, A conveys certain real estate to B, to be held in trust by B for C (a minor), the rents and profits from which are to be applied by B, the trustee, to the support, maintenance, and education of C until he shall arrive at majority, with the further provision that B shall convey such real estate absolutely to C when the latter becomes twenty-one years old. This deed would create a trust, would be a "transfer in trust," and could not be construed or regarded as merely creating a lien or hypothecating property for the performance of an act, and would create no lien which could be foreclosed, either with or without an action commenced for that purpose. Again, if A files his petition in insolvency under the provisions of our code, is adjudged an insolvent, and his creditors select an assignee by the proper proceeding, whereupon the clerk of the court in which the action is pending makes a deed conveying the property of the insolvent to such assignee (as the law makes it his duty to do), this deed

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is a transfer in trust for the benefit of the creditors of the insolvent, but it is not a mortgage, subject to the operation of the statutes cited *supra*. Any hypothecation of property made by the debtor by his own voluntary act, as security for the payment of a debt which he owes to his creditor, whether made with or without the intervention of a third party as trustee, is, under the statutes above quoted, a mortgage, and to be so regarded and treated, whether the instrument by which such property is hypothecated is called a mortgage, deed, or trust deed, irrespective of its form or provisions. The legislature, following the trend of modern legislation in enacting the statutes quoted *supra*, intended to protect the debtor from burdensome liabilities by providing for contracts under which the creditor may be secured, yet protecting the debtor from oppression, and giving him, in case of default prior to enforcement of security given in the nature of a mortgage for the payment of a debt which he owes his creditor, the right to meet his creditor, in an action in a competent court, where he may present any defense which he may have against his creditor, insuring to the debtor a judicial sale of the property hypothecated, and securing to the debtor the right to redeem from such sale within a given time after it is made. The legislature has provided that all contracts in restraint of the equity of redemption are void, that the hypothecation of property for the payment of a debt is a mortgage, and that a mortgage can be enforced only by an action of foreclosure, brought in a competent court, yet it is contended that the trust deed in question, executed merely for the purpose of securing the payment of a given debt at a specified time, was properly foreclosed by notice and sale, without an action commenced in the proper court, and that by such sale the absolute title of the grantor passed to the purchaser, and, further, that such sale deprived the grantor of all right of redemption from such sale. This contention is contrary to the letter, and repugnant to the spirit, of our statutes, and is in direct contravention to the general policy and evident intent of the statutory law of this state. We feel compelled to hold that the instrument in question must be treated and regarded as a mortgage. Mr. Jones in his work on Mortgages, at section 1769, says: "Deeds of trust,

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as has already been noticed, are, in legal effect, mortgages. Where a mortgage is regarded, in accordance with the common-law doctrine, as a conveyance of the legal estate, a deed of trust is, of course, none the less a conveyance of the legal estate. The only difference of opinion on this point is whether, in those states in which a mortgage is regarded as a mere lien, and not a conveyance of the legal estate, a deed of trust shall be held to vest the legal estate in the trustees. Generally, a deed of trust is in this respect held to have only the same effect as a mortgage; such being the decision in Iowa, Nebraska, and Kansas. But, on the other hand, in Florida, and perhaps in other states, it is held that, although a mortgage does not vest the legal estate in the mortgagee, a deed of trust is a conveyance which does vest the legal title in the trustee."

Under the statutes cited *supra*, no contract creating a lien upon specific property for the payment of a debt can convey the legal title. A mortgage, or any contract in the nature of a mortgage, merely creates a lien, and leaves the legal title in the mortgagor or grantor, which can only be passed out of him by judicial sale, in a proper action under the statute, after which such grantor or debtor may redeem within the time provided by law for redemption of property from execution sale. It may or may not be wise to prescribe by legislation rules for the protection of the debtor. With that question we have nothing to do. The legislature have the right to prescribe rules protecting the weak and impecunious from oppressive contracts, under which usury may be extorted, or valuable property forfeited for a nominal sum. It is the duty of the court to expound and apply the law as it is found. It is also the duty of the court to give to the statutes in question a liberal construction, to the end that the policy and intent of such statutes, taking them as a whole, with relation to the subject regulated, may be carried out and enforced. The legislature having defined so clearly and forcibly the characteristics of a mortgage, and provided for the enforcement of mortgages by judicial action only, we could not hold that an instrument in the nature of a mortgage, given for the same purpose that mortgages are given, and which is, by the positive terms of our statutes, to be regarded and treated as

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a mortgage, can be enforced or foreclosed, in any manner other than that prescribed for the enforcement or foreclosure of mortgages, without giving to the statutes under consideration a strained, technical, and unreasonable construction, which would defeat, in part at least, some of the manifest objects of the statutes under consideration.

But it is argued with much force by the respondents that the statutes under consideration were borrowed from our sister state, California; that said statutes have been given a different construction by the courts of California; and that the construction so given by the California courts is binding upon this court, the statutes having been adopted with reference to the construction placed on them, prior to their adoption here, by the state from which we borrowed them. To show the different construction of the statutes under consideration from that here given, we are cited to the cases of *Koch v. Briggs*, 14 Cal. 256, 73 Am. Dec. 651; *Bateman v. Burr*, 57 Cal. 483; *Fogarty v. Sawyer*, 17 Cal. 589; *Grant v. Burr*, 54 Cal. 298; *Durkin v. Burr*, 60 Cal. 360; *More v. Calkins*, 95 Cal. 437, 29 Am. St. Rep. 128, 30 Pac. 583; *Barr v. Shroeder*, 32 Cal. 614; *Thompson v. McKay*, 41 Cal. 221; *Fuquay v. Stickney*, 41 Cal. 583; *Savings etc. Soc. v. Deering*, 66 Cal. 286, 5 Pac. 353; *Partridge v. Shepard*, 71 Cal. 477, 12 Pac. 480. We have carefully examined all of the California cases cited, and it does not appear, from any of the cases, that the statutes which we have borrowed from California, relating to the subject under consideration, quoted *supra*, have been considered and construed by the supreme court of California *in pari materia*, or that said statutes had been construed and considered as one system, in conformity to the rule laid down by Mr. Sutherland in his work on Statutory Construction, hereinbefore quoted.

Owing to the fact that our codes which we adopted in 1887 were, to a great extent, copied from the California codes adopted in 1872, the courts in this jurisdiction take notice of the California code for the purpose of comparing the provisions of our codes with those of the California codes, thus enabling our courts to ascertain the construction placed upon those statutory provisions which we have borrowed from the California code

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by the supreme court of California. Sections 3325, 3327, 3328, 3333, 3334, 3350, 3353, and 3354 of our Revised Statutes, quoted *supra*, are identical with sections 2872, 2874, 2875, 2888, 2889, 2920, 2924, and 2925 of the Civil Code of California; and sections 4520 and 4523 of our Revised Statutes are the same as sections 726 and 744 of the Code of Civil Procedure of California. The California Civil Code of 1872 contains the two following sections, which were never adopted by the legislature of Idaho, to wit:

"Sec. 2931. A mortgagee may foreclose the right of redemption of the mortgagor in the manner prescribed by the Code of Civil Procedure.

"Sec. 2932. A power of sale may be conferred by a mortgage upon the mortgagee or any other person, to be exercised after a breach of the obligation for which the mortgage is a security."

It will thus be seen that our legislature have adopted only a portion of the system relating to the subject under consideration which the legislature of California had adopted fifteen years prior to the enactment of our statutes in question here. Our legislature having adopted only a part of that system, refusing to adopt sections 2931 and 2932 of the Civil Code of California, and which authorize the execution, by the mortgagee, or trustee in a trust deed, of a power of sale given in such mortgage or trust deed, we think the conclusion irresistible that our legislature intended that a power of sale should not be given, or, if given, should not be exercised by a mortgagee, or by a trustee in an instrument termed a trust deed, but which is, in contemplation of law, merely a mortgage. Section 744 of the Code of Civil Procedure of California, cited *supra*, was construed by the supreme court of California in *Koch v. Briggs*, *supra*, without reference to any other statute, apparently, the said section being section 260 of the original Practice Act referred to in that decision. Whether sections 2931 and 2932 of the California Civil Code, cited *supra*, or similar statutes, were in force in California at the time the case of *Koch v. Briggs* was decided, we are not advised. But, if the said two last-named statutes were then in force in California, the supreme

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court of California must have taken them into consideration in construing section 260 of the California Practice Act, although said statutes were not mentioned in that decision.

To uphold the rule contended for by the respondents, by enforcing a power of sale contained in an instrument, whether termed a mortgage or trust deed, would violate one of the oldest maxims of law, by doing indirectly that which cannot be done directly, but which is prohibited by law. We are cited to the case of *First Nat. Bank v. Bell Silver etc. Min. Co.*, 8 Mont. 32, 19 Pac. 403, decided by the supreme court of Montana in 1888, and the same case in 156 U. S. 474, 15 Sup. Ct. Rep. 440, as sustaining the position contended for by the respondents. In the decisions rendered in that case by the supreme court of the territory of Montana and by the supreme court of the United States it does not appear that Montana had adopted all of the statutes which we have quoted from our Revised Statutes, nor does it appear in either of the decisions in that case that Montana did, like Idaho, adopt part, and refuse to adopt all, of the provisions of the California code relating to the subject under consideration; hence the decisions in the Montana case are not applicable. This is the first time that this question has been before this court, and, if we had adopted all of the provisions of the California code relating to the subject under consideration, or if our statute, section 4523, *supra*, corresponding to section 260 of the original California Practice Act (now section 744 of the California Code of Civil Procedure), and corresponding to section 371 of the Compiled Laws of Montana (as cited in *First Nat. Bank v. Bell Silver etc. Min. Co.*, 8 Mont. 32, 19 Pac. 403), we should feel constrained to follow the rule announced by the supreme court of California in *Koch v. Briggs, supra*, and since followed by that court, and by the supreme court of Montana. The rule that, by adopting a statute from a sister state the construction of the statute by the courts of the latter state is also adopted, is a general rule that is universally recognized. But this rule does not apply to a case where the statute borrowed has been so changed or modified by the state borrowing it as to materially change the policy of the statute thus borrowed, nor does the rule apply to a case where one state adopts only a por-

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tion of the statutes of another state upon a given subject, and the construction does not reasonably apply to the portion of the system so borrowed. In our view, if all of the statutes of California referred to herein were considered *in pari materia*, and so construed, they would justify and fully support the California rule; and while the California court has not, in construing section 744 of the California Code of Civil Procedure, in any of the cases to which our attention has been called, referred to the other statutes named, yet we feel convinced that that court, in construing said statute, had in mind the other statutes relating to the same subject, and construed said statute with reference to the others relating to the subject under consideration.

Respondents in their brief cite the following note to section 744 of the California Code of Civil Procedure, to wit: "Deeds of trust are to be distinguished from mortgages. This section has no application to them. (*Bateman v. Burr*, 57 Cal. 480; *Grant v. Burr*, 54 Cal. 294; *Koch v. Briggs*, 14 Cal. 256, 73 Am. Dec. 651.)" And, in support of the doctrine announced in said note by the compilers of the California code, the respondents have cited us to the citations contained in an article written by Judge Dillon in 2 American Law Register, New Series, page 655. Those authorities hold that a deed of trust places the legal title in the trustee. That was the rule at common law, but does not apply here, for the reason that it is in direct contravention of the provisions of our statutes. Judge Dillon, in section 4 of said article (Id. 648), says: "Deeds of Trust and Mortgages, with Power of Sale, Substantially Identical. A mortgage with a power of sale, and a deed of trust where the power of sale is placed in a third person, are in substance the same. Some of the cases have denied this. But those taking this view are numerous. Kent defines a 'mortgage' thus: 'A mortgage is the conveyance of an estate by way of pledge for the security of debt, and to become void on payment of it. The legal ownership is vested in the creditor; but, in equity, the mortgagor remains the actual owner, until debarred by his own default or judicial decree.' (4 Kent's Commentaries, 136.) He refers to instruments with powers of sale as mortgages. (4

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Kent's Commentaries, 146.) No doctrine is more invincibly established than that every instrument intended to secure the payment of money or the performance of some collateral act is a mortgage. This is the test: 'If a transaction resolve itself into a security, whatever may be its form, and whatever name the parties may choose to give to it, it is in equity a mortgage.' "

Our statutes are in harmony with the rule announced by Judge Dillon, but they overturn the doctrine announced by Kent, that the legal title passes to the mortgagee. The sale under the trust deed in this case was without authority of law, and did not pass the title from Roberts, the grantor of appellant, to the respondent, and the title to the property in question, i. e., the one-third in dispute, is in the appellant. It is alleged in the complaint, and admitted in the answer in this case, that on the thirteenth day of February, 1890, the appellant tendered to the defendants, respondents here, the sum of \$1,900 in payment of the debt, and interest thereon, mentioned in said trust deed, and in settlement of the costs of sale and attorney's fees incurred in the sale under the trust deed in question. The appellant in his complaint alleged his readiness and willingness to pay the amount of said debt, interest, and cost to the defendants at any time that they would receive the same, and that he is ready and willing to produce into court the said money whenever the same shall be accepted by the defendants or ordered by the court. The defendant Venable, or the defendants, as the case may be, as owner of said trust deed, is entitled to receive from the appellant the amount of the debt mentioned in said trust deed, to wit, \$1,500, with whatever interest was due thereon the thirteenth day of February, 1890, the time of the making of said tender by appellant, subject to offset by whatever amount may be found due to the plaintiff from the defendants on final accounting.

It appears from the record in this case that the defendants have been working the mining property in question since the seventeenth day of August, 1889, and have extracted large quantities of valuable ore therefrom, and that the said defendants fail and refuse to account for the value of said ores, and fail and refuse to recognize the rights of the plaintiff therein. As

Points decided.

owner of an undivided one-third interest in and to said mining property mentioned in the complaint in this action, appellant is entitled to one-third of the profits accruing from the working of said mine, and from the sale of ores extracted therefrom, by the defendants, and to this end an accounting must be had in the court below. The plaintiff is also, by virtue of the assignment from George H. Roberts to him, entitled to one-third of whatever sum may have been due to said George H. Roberts, at the date of said assignment, from the proceeds of said mining property, from the defendants, after the payment of all legitimate and proper expenses incurred by the defendants in working said mining property, up to the time of said assignment. Several questions have been raised in this case which we have not passed upon, and which we deem it unnecessary to pass upon, for the reason that the conclusions reached, and the views herein expressed, sufficiently cover the case to enable the district court to settle the whole controversy between the parties in accordance with law and justice. The order denying the plaintiff a new trial is reversed, and the cause remanded to the district court, with instructions to vacate and set aside the judgment in favor of the defendants, and to grant the plaintiff a new trial, and for further proceedings consistent with the views herein expressed. Costs of this appeal awarded to the appellant.

Sullivan, C. J., and Huston, J., concur.

(February 3, 1898.)

FIRST NAT. BANK OF HAILEY v. SONNELITNER.

[51 Pac. 993.]

ATTACHMENT LEVY.—The provisions of the statute in regard to the levy of a writ of attachment must be substantially complied with in order to create a lien under the attachment.

NOTICE OF LEVY—SUFFICIENCY OF DESCRIPTION.—The notice of the levy of attachment required by the statute to be filed in the county recorder's office, must describe the property sufficiently to identify the property so that a purchaser can tell from the notice itself what property he is buying.

Argument for Respondent.

SAME—PAROL EVIDENCE.—Parol evidence is not admissible to cure a description in a notice of levy and attachment when the description is vague and uncertain.

(Syllabus by the court.)

APPEAL from District Court, Blaine County.

N. M. Ruick, for Appellant.

The description in the writ of attachment in the case of *Bank v. Hendel* was so defective as to be void. (*Menley v. Zeigler*, 23 Tex. 88; *Porter v. Byrne*, 10 Ind. 147, 71 Am. Dec. 305; *Hathaway v. Larbee*, 27 Me. 449; *Henry v. Mitchell*, 32 Mo. 512; *Taylor v. Cozart*, 4 Humph. 433, 40 Am. Dec. 655, and cases cited in note on page 656.) It fails to locate the land in any city, town, county or state. The statute (Idaho Rev. Stats., sec. 4307) requires certain formalities to be complied with in order that a valid attachment of real estate may be had. Each of the requirements must be complied with, otherwise the attachment will be invalid. (Cal. Code Civ. Proc., sec. 542; *Main v. Tappener*, 43 Cal. 206, 209, 55 Cal. 172; *Watt v. Wright*, 66 Cal. 202, 208, 5 Pac. 91; *Wheaton v. Neville*, 19 Cal. 41, 44.) Plaintiff in ejectment must recover upon the strength of his own title. (*Gage v. Downey*, 94 Cal. 241, 29 Pac. 635; *Heay v. Butler*, 95 Cal. 206, 30 Pac. 208; *Woodworth v. Fuelton*, 1 Cal. 295; *Coryell v. Cain*, 16 Cal. 567, and cites 22 Cal. 515; 1 Ariz. 154; 5 Utah, 214, 14 Pac. 338, distinguished, 23 Cal. 536.)

R. F. Buller, for Respondent.

In ejectment against the defendant in execution, or one claiming under him, the plaintiff need only show his judgment, execution and sheriff's deed. (Rohrer on Judicial Sales, sec. 1072.) Where both parties claim under a common source of title, no title need be shown back of the common grantor, the only question being which of the two has derived the best title from the common source. (*Whitman v. Steiger*, 46 Cal. 256; *Frink v. Roe*, 70 Cal. 296, 11 Pac. 820.) The sheriff's return is not the only evidence of what he did with a writ. The facts may be shown by other evidence and especially by the evidence of the sheriff himself. (*Ritter v. Scannell*, 11 Cal. 239, 70 Am.

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Dec. 775.) We think the description is amply sufficient and is quite definite, so far as these lots are concerned. (*Whittaker v. Sumner*, 9 Pick. 308; *Bacon v. Leonard*, 4 Pick. 277; *Moore v. Kidder*, 55 N. H. 488.) A defective description in the levy is cured by a correct description in the sheriff's deed. (*Rohrer on Judicial Sales*, sec. 702, and cases cited.)

QUARLES, J.—The respondent, as plaintiff, commenced this action in ejectment to recover lots 9 and 10, in block 42, in the town of Hailey, Blaine (formerly Alturas) county, Idaho. The material averments of the complaint are denied by the answer. The cause was tried by the court without a jury, and findings of fact, conclusions of law, and judgment were made and entered in favor of the plaintiff. The defendant moved for a new trial on two grounds: (1) Insufficiency of the evidence to justify the decision; and (2) errors of law occurring at the trial, and excepted to by the defendant. The district court denied the motion for a new trial, from which order denying a new trial, and from the judgment in favor of the plaintiff, the defendant appeals.

It appears from the record that the defendant claims title from and through one John Hendel by virtue of a conveyance of date October 25, 1893; that on the fourteenth day of July, 1893, in an action then pending in the district court of the fourth judicial district in and for Alturas county, commenced by the plaintiff in this action as plaintiff, against said Hendel as defendant, to recover a debt of \$560 from said Hendel, an attachment was issued against said Hendel in favor of the plaintiff, and an attempt made to levy the same upon the lots in question; that afterward judgment was rendered in said action in favor of the plaintiff and against the said Hendel; that on the said judgment an execution was issued in favor of the plaintiff, and against the property of said Hendel, on the twenty-sixth day of February, 1895, under which the lots in question were sold on the twenty-sixth day of March, 1895, and purchased by the plaintiff, who received a certificate of purchase from the sheriff, and afterward, to wit, March 28, 1896, said sheriff made a sheriff's deed, in the usual form, to plaintiff, purporting to convey to the plaintiff the title of said Hendel

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in and to said lots. Both parties claiming title to the said premises from the same common source, the said John Hendel, it was only necessary for the plaintiff in this action, in order to recover, to show a valid title from said Hendel prior to that of the defendant.

Has the plaintiff done this? To prove title in it, the plaintiff, a corporation, introduced, with other documentary evidence, the said writ of attachment, which appears on its face to be regular, and a copy of the said writ, and a notice of levy, filed in the office of the county recorder in and for said Alturas county, on the seventeenth day of July, 1893, in words and figures as follows, to wit:

“NOTICE.

“To the recorder of Alturas county, to John Hendel, defendant, and to whom it may concern:

“Notice is hereby given that by virtue of a certain writ of execution issued out of the probate court of said county, wherein the First National Bank of Hailey, plaintiff, and John Hendel, defendant, of which the annexed is a copy, I have this day seized, levied upon and attached all the right, title and interest of the said defendant in and to the following premises, to wit: Lots 9 and 10 in block 42, lots 3 and 4, block 31 part section 9, township 2 north of 18 east, about 6 acres; commencing at a stake 260 feet from the north corner of River and Bullion streets in the town of Hailey, being the southwest corner of the property of Dominick Nitschke, and running thence in a westerly direction along the line of the Bullion road 230 feet, thence rectangular in a northerly direction 300 feet, thence in an easterly direction 350 feet, thence in southerly direction 122 feet, thence 120 feet in a westerly direction, thence 178 feet in a northerly direction to the place of beginning. Done in Alturas county this fourteenth day of July, 1893.

“A. J. JACKSON,
“Sheriff.

“By C. D. SANDERS,
“Deputy Sheriff.

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“Recorded at the request of C. D. Sanders, at 4:10 o'clock P. M., July 17th, 1893.

I. W. GARRETT,
“County Recorder,
“By S. C. JOHN,
“Deputy.”

It will be seen that the notice does not speak of the attachment, but of an execution from the probate court, “of which the annexed is a copy.” The said notice and copy appear to have been proven by introducing and reading in evidence “page 319 of book 1 of Attachment Records,” as plaintiff’s exhibit “F,” to the introduction of which the defendant objected, on “the ground that the same was incompetent, irrelevant and immaterial, and not describing the property in controversy at all,” which objection was overruled, to which the defendant duly excepted.

Under the provisions of our code, a levy of an attachment is made upon real estate, the title of which is in the defendant to the writ, by filing with the recorder of the county a copy of the writ, together with a description of the property attached, and a notice that it is attached, and by leaving a similar copy of the writ, description and notice with the occupant of the property, if there is one; if not, then by posting the same in a conspicuous place on the property attached. If the acts required are not performed by the officer, there is no levy of the writ. The description of the property which must be filed with the copy of the writ and notice of levy, while it need not be technically correct in every particular, a substantial compliance with the statute being sufficient, yet such description must be sufficient to give notice to a reasonably prudent man as to the identity of the property attached. Was the description given sufficient? It will be noticed that there are five separate parcels of land described in the notice, viz.: Lots 9 and 10, in block 42; lots 3 and 4, in block 31; and part of section 9, township 2 north, of 18 east, about 6 acres, “commencing at a stake two hundred and sixty feet from the north corner of River and Bullion streets, in the town of Hailey,” etc. The notice does not say what state or what county the property is in. It does

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not say what town lots 9 and 10 of block 42 are in. It does not say what town lots 3 and 4 of block 31 are in. In fact, a reasonable inference from the description would be that the lots 9 and 10 of block 42, and lots 3 and 4 of block 31, situated somewhere near Hailey, compose part of section 9, township 2 north, of range 18 east, and that said lots embrace about six acres, say about one and one-half acres each. Thus it could be inferred that a block composed of ten blocks or more would embrace fifteen acres or more. Inasmuch as towns are not platted and subdivided into lots and blocks of the size and dimensions suggested, we could not infer or presume that the lots in question are in any certain town. But it is agreed by both parties that the six acres described does not embrace either one of said lots, but that it is separate and distinct from the said lots, and that said six-acre tract is outside of the limits of the town of Hailey. With this fact admitted by both sides, there is but one thing certain about the description, and that is that the starting point in the boundary of the six-acre tract, as given, is two hundred and sixty feet, in some unknown direction, from a given point in the town of Hailey. But the respondent contends that the clause, "in the town of Hailey," refers to the said lots 9 and 10, block 42, and shows that they are in the town of Hailey. This contention is not correct, for the reason that the clause, "in the town of Hailey," is used with direct reference to the starting point in the metes and bounds of the six-acre tract, and refers to that tract only. Now, suppose the description had stopped with the four lots, and the six-acre tract was left entirely out of it; could it then be told that said lots are in the town of Hailey from the description itself? Certainly not, as the notice would then read: "Notice is hereby given that, by virtue of a certain writ of execution issued out of the probate court of said county, wherein the First National Bank of Hailey, plaintiff, and John Hendel, defendant, of which the annexed is a copy, I have this day seized, levied upon and attached all the right, title and interest of the said defendant in and to the following described premises, to wit: Lots 9 and 10 in block 42, lots 3 and 4, block 31. Done in Alturas county this fourteenth day of July, 1893." But the respondent says the court must

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take judicial notice of the fact that Hailey is in what was formerly Alturas county. If that be true, we must also take notice of the fact that Ketchum is in the same county. Suppose the notice had described lots 3 and 4, in block 31, as being in Ketchum, and had failed to say whether lots 9 and 10, block 42, are in Ketchum or Hailey, or some other town, and then proceeded to describe the six-acre tract as it does; could it be contended that notice was given that said last-named lots are in Hailey? We think not.

The notice of the levy of the attachment required by the statute must contain a description of the property attached, not absolutely certain, but sufficiently certain to inform a man of ordinary prudence as to the identity of the property that is attached. The notice in this case did not do that. It cannot be told from the notice whether lots 9 and 10 are in the town of Hailey, or in the town of Ketchum, or in the town of Bellevue; or in some other town. The levy of the attachment was void, for the reason that the description is so vague and uncertain that it does not identify the property in controversy. A stranger could not take the description in the notice, and from such description alone find the property. A deed to said lots, containing the description in said notice, would be void for uncertainty.

The notice of levy must describe the land with as much certainty as the sheriff's deed. The description must be such that a purchaser can tell from it the identical land which he buys. Parol evidence is not admissible to help out a defective description in the notice of levy required by the statute. We think the views herein announced are abundantly supported by authority. (See *Porter v. Byrne*, 10 Ind. 147, 71 Am. Dec. 305; *Meuley v. Zeigler*, 23 Tex. 88; *Henry v. Mitchell*, 32 Mo. 512; *Hathaway v. Larrabee*, 27 Me. 449; *Taylor v. Cozart*, 4 Humph. 433, 40 Am. Dec. 655, and notes; *Wheaton v. Neville*, 19 Cal. 41; *Main v. Tappener*, 43 Cal. 206; *Watt v. Wright*, 66 Cal. 202, 5 Pac. 91.)

Even if the description in the notice of levy was sufficient, yet it is doubtful if we have authority to hold that the plaintiff acquired a lien by reason of the attempted levy of said attach-

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ment. Notice of levy of an execution from the probate court is not notice of levy of an attachment from the district court. It appearing beyond question from the record that the plaintiff acquired no lien by attachment upon the lots in dispute; that the judgment upon which its said execution issued was rendered after said Hendel had conveyed the same by the deed under which the defendant claims; that the plaintiff acquired no title in said lots by reason of said execution sale and sheriff's deed; that the plaintiff cannot recover in this action; and for these reasons the order denying the defendant a new trial is reversed, the judgment in favor of the plaintiff is reversed, and the cause remanded to the district court, with instructions to enter judgment dismissing the action, with costs to the defendant; costs of this appeal awarded to the appellant.

Sullivan, C. J., and Huston, J., concur.

(February 3, 1898.)

DUNNIWAY v. LAWSON.

[51 Pac. 1032.]

APPROPRIATION OF WATER—FIRST IN TIME, FIRST IN RIGHT.—In case of conflict between the appropriators of water in a given stream, that appropriation that is first in time, is first in right. The decision in *Hillman v. Hardwick*, 3 Idaho, 255, 28 Pac. 438, cited and approved.

(Syllabus by the court.)

APPEAL from Third Judicial District, Idaho Territory, Custer County.

Hawley & Reeves, for Appellant.

No brief filed.

Texas Angel, for Respondent.

No brief filed.

HUSTON, J.—This case has been pending in this court since 1892, but owing to the fact that two members of this

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court were disqualified to consider or decide the case, having been of counsel in the court below, it has remained undisposed of. The objection no longer existing, and the parties desiring a disposition of the case, it is submitted for decision. There is no bill of exceptions, no assignment of errors, and no briefs filed in the case, the statement containing upward of four hundred folios, a large portion of which is taken up with pleadings in the case. The court finds, as matter of fact, that the plaintiffs are entitled, as prior locators, to all the waters of Alder creek, the right to the waters of said creek being the sole question in litigation; that plaintiffs are the owners of twelve hundred and eighty acres of land, for the irrigation of which the waters of said Alder creek are necessary and used for that purpose. The court then proceeds, admittedly, without authority of law or precedent, and apports to the defendants absolutely a certain amount of said water, and makes such apportionment to defendants coequal with the rights of plaintiffs, already found to be prior to those of defendants. The only question involved in this case was decided by this court in the case of *Hillman v. Hardwick*, 3 Idaho, 255, 28 Pac. 438. The district court, having found that plaintiffs were entitled, by virtue of a prior location, to the waters of Alder creek, and that they had been and were using the same in the irrigation of their land, should have stopped there, as that was the only question involved. The utmost extent to which the court had authority to go was to declare that such waters of Alder creek as were not necessarily required by plaintiffs in the proper and necessary irrigation of their land might be used by defendants, but that all rights of defendants to such water were and must remain inferior and subservient to the rights of plaintiffs. The case is remanded to the district court, with instructions to modify and reform the judgment and decree herein in conformity to this opinion, each party to pay one-half of the cost of the appeal.

Quarles, J., concurs.

Sullivan, C. J., having been of counsel in the lower court, took no part in the hearing or decision.

Argument for Appellant.

(February 4, 1898.)

RAFT RIVER LAND AND CATTLE CO. v. LANGFORD.

[51 Pac. 1027.]

COSTS—WHAT PREVAILING PARTY IS ENTITLED TO.—Where an order to show cause why an injunction should not issue is apparently heard by consent or agreement of parties, without any attempt to comply with the provisions of the statute in relation thereto, the prevailing party is entitled to recover disbursements actually and necessarily made in preparing for such hearing, including the cost of procuring witnesses; and where, upon an appeal from an order made upon such hearing, an appeal is taken, the prevailing party being the appellant he is entitled to tax in his costs the amount paid by him to procure a copy of the evidence from the court stenographer, i. e., reporter.

(Syllabus by the court.)

APPEAL from District Court, Cassia County.

Moyle, Zane & Costigan, for Appellant.

The court erred in holding that as a matter of law the appellant, F. M. Langford, was not entitled to tax against the respondents the seventy-five dollars fees actually expended by him for the typewritten copy of the court reporter's stenographic report of the testimony at the hearing. The court erred in holding as a matter of law that witnesses are not entitled to mileage beyond the county line of the county where the cause is tried. On the right of appellant to tax up against the plaintiffs the cost of the stenographer's typewritten transcript of the record, section 5 of the act approved March 8, 1895, and found in the Laws of Idaho of 1895, pages 69, 70. The right of the appellant to some mileage for his witnesses is not disputed here. The appeal is from so much only of the order reducing the mileage as confines his right to mileage within the county where the case was tried. The only provisions of the Idaho statutes that can possibly have any bearing on the question of mileage are the following sections of the Revised Statutes of Idaho, 1887, to wit, sections 6139, 6039; and the sections of an act relative to depositions approved March 6, 1893. (Laws 1893, pp. 133, 134.) Section 6039 of the Idaho Stat-

Argument for Respondents.

utes of 1887, providing that a witness is not obliged to attend court out of the county in which he resides, unless the distance be less than thirty miles from his place of residence to the place of trial, does not prohibit the granting of full mileage to a witness attending from a greater distance and such a witness is entitled to full mileage. (*Briggs v. Rumely Co.*, 96 Iowa, 202, 64 N. W. 784; *Alexander v. Harrison*, 2 Ind. App. 47, 28 N. E. 119; *Wilson v. St. Louis etc. R. R. Co.*, 53 Mo. App. 342.) Moreover, the fact that the deposition of a witness can be taken and used does not mean that he cannot come himself and charge his witness fees for doing so, for he can. (*Alabama Midland Ry. Co. v. Rushing*, 102 Ala. 542, 15 South. 853.)

Hawley & Puckett, for Respondents.

We call the court's attention to section 5, 1st Session Laws, page 234, and the fact that the portion of the section referred to by counsel for appellant has been a part of the statute since 1891. Section 4912 of the Revised Statutes gives the prevailing party in certain cases the right to recover costs, and upon that section all cost-bills must be based. (*Griffiths v. Montandon*, 4 Idaho, 75, 35 Pac. 704; *McDonald v. Burke*, 3 Idaho, 266, 35 Am. St. Rep. 276, 28 Pac. 440.) Section 274 of the California Code of Civil Procedure is in effect the same as our first session laws in reference to charging reporter's fees. (See *Barkly v. Copeland*, 86 Cal. 493, 25 Pac. 3.) The question of costs is discretionary with the judge, and where any item appears to be improper as in this case, it should be stricken out on motion as was done in the case at bar. (*Miller v. Highland Ditch Co.*, 91 Cal. 103, 27 Pac. 536.) There was no need to have witnesses present as their affidavits might have been used upon the hearing, and that when the parties chose to bring their witnesses in person and take their evidence before the court, they did so of their own volition, and there is no authority of law by which their mileage and *per diem* can be charged against the losing party. (*Butcher v. Vaca V. R. R.*, 56 Cal. 599; *Mylius v. St. Louis etc. Ry. Co.*, 31 Kan. 232, 1 Pac. 619; *Clark v. Dewey*, 5 Johns. (N. Y.) 250; *Wickham v. Secley*, 18 Wend. 649; *United States Equitable Life A. Co. v. Hughes*, 125 N. Y. 106, 26 N. E. 1.)

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HUSTON, J.—The plaintiffs brought suit in the district court for Cassia county to restrain defendant from using the waters of Raft river from the first day of October to the first day of April. Upon the filing of plaintiffs' complaint, an order to show cause at the town of Hailey, in Blaine county, Idaho, on the fifth day of December, 1895, why an injunction should not issue as prayed, was issued, and duly served upon the defendant. The complaint of plaintiffs was filed on November 6, 1895. The order to show cause was issued on November 13, 1895. The answer of defendant, specifically denying the allegations of the complaint, was filed on November 26, 1895. Upon the hearing upon the order to show cause, an injunction was issued as prayed in plaintiffs' complaint. From the order of the court directing the issuance of such injunction an appeal was taken by defendant to this court, which reversed said order, and remanded said cause to the district court for Cassia county for further proceedings in accordance with the decision of this court therein. It seems, on the coming down of the *remittitur* from the supreme court to the district court, the defendant filed in said district court his memorandum of costs upon the appeal, as well as upon the hearing upon the said order to show cause. No other proceedings appear to have been taken in the district court upon the original case. On February 10, 1897, plaintiffs filed a motion in said district court to retax costs. Said motion was heard before the judge of said district court, and on the 14th of September, 1897, said judge made an order striking out and disallowing from said memorandum of costs, so as aforesaid filed by defendant, the item of seventy-five dollars included therein for reporter's fees. Subsequently, and as would seem from the record, at the September term of said district court for Cassia county, the plaintiffs moved the court to retax the said costs by striking from the memorandum of costs filed by defendant the sum included therein for mileage of witnesses on the part of defendant, who appeared and testified upon the hearing upon the order to show cause as aforesaid. Upon the hearing of said motion the said court did make an order limiting the allowance for mileage to witnesses on the part of defendant to thirty-two miles' travel in each case. The defendant ap-

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peals from the action and orders of the district court in so reducing the amount of defendant's memorandum of costs.

The first error charged by appellant is in the action of the district judge in striking from the appellant's memorandum of costs, and disallowing, the charge of seventy-five dollars paid by appellant to the court stenographer for a copy of the evidence taken upon the hearing on the order to show cause. Section 5 of the act of March 8, 1895, in relation to court stenographers of district courts, provides: "It shall be the duty of each reporter to furnish on the application of . . . any party to a suit in which a stenographic record has been made, a typewritten copy of the record, or any part thereof, for which he shall be entitled to receive in addition to his salary a fee of fifteen cents per hundred words, to be paid by the party requesting the same and to be taxed as costs in the case against the party finally defeated in the action." Respondents contend that as this was not a trial before the court, but a proceeding before the judge at chambers upon a motion to show cause, the provisions of said section 5 do not apply, and this appears to have been the view of the district judge. We cannot agree with this conclusion. The statute says nothing about a trial; the only designation is, "a suit in which a stenographic record has been made." The suit instituted by plaintiffs was for the sole purpose of procuring an injunction to restrain appellant from using the waters of Raft river during a certain period, to wit, between the first day of October and the first day of April. By order of the court this question was heard and determined before the district judge of Hailey, in Blaine county. No other trial or hearing was ever had in the case. The whole matter was then and there heard and determined, so far as the district court was concerned. The stenographer is an officer of the district court, and as such is presumed to be in attendance upon the court, or the judge thereof, whenever his attendance is required. It will scarcely be contended, we apprehend, that the district judge would dispense with the services of the stenographer upon a hearing of the character, importance and extent of the one in this case. The making of a "stenographic record" in this case was indispensable to a proper consideration of the case by the

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judge, and, such "stenographic record" having been made, the appellant was entitled to a copy thereof on payment to the reporter of the fees thereof prescribed by law. Such copy being necessary to the appellant in the preparation of his appeal or bill of exceptions, and having paid the same, and having finally prevailed in the action, he is entitled to tax the same as costs against the plaintiff. The statute is plain and unambiguous, and, the appellant having brought himself clearly within its provisions, he is entitled to the benefits thereof.

From an examination of the section of the statute last quoted, it will, we think, be apparent that the incurring of costs in a proceeding like that under consideration is largely within the discretion of the parties litigant, and it would therefore be impracticable to enunciate an arbitrary rule to govern the allowance of costs in all cases arising under that statute. The case is one in equity. The complaint sought an injunction, and that only. The court ordered the hearing upon the order to show cause to be heard at Hailey, Blaine county, some two hundred miles distant from the place where the action was pending, to wit, Albion, Cassia county. Before the time set for the hearing upon the order to show cause, to wit, on November 26, 1895, the defendant filed his duly verified answer, specifically denying all of the material allegations of the complaint. At the hearing of the motion to show cause the case stood upon complaint and answer. No affidavits had been filed or served by plaintiffs, as contemplated by section 4297 of the Revised Statutes. It will, we think, be apparent, from an examination of this section of our statutes, that it is not contemplated therein that any hearing, either upon an order to show cause or an application to dissolve an injunction as in said section provided for, shall be heard otherwise than upon the pleadings in the case and affidavits filed in support thereof, except as in said section provided, where, upon notice by the adverse party, the moving party is required "to produce at the hearing, for cross-examination before the court or judge, the affiants of the affidavits upon which he relies for the injunction or to resist the application for its dissolution." It is only when the party opposing the motion or required to respond to the order to show cause has

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by notice required the moving party to produce the affiants of his affidavits, at the hearing for cross-examination, that such opposing party is authorized or required by the statute to produce witnesses upon the hearing. Under the conditions existing at the time of the hearing, the case being upon complaint and answer, and the answer having fully and positively denied all of the allegations of the complaint, the defendant would, on motion, have been entitled to a dismissal of the restraining order, and a refusal of the preliminary injunction prayed for in plaintiff's complaint. The fact that this course was not pursued by defendant leads us to believe that the course that was taken was the result of some agreement or understanding between the parties. If this were so, it would be inequitable to permit the plaintiffs to evade the payment of costs incurred by defendant by reason of or through the acts of plaintiffs. If the defendant had not produced his witnesses at the hearing, which under the statute he was not compelled to do, a continuance of the hearing would have been inevitable. This would have involved delay which it is reasonable to presume would have been undesirable to plaintiffs. No affidavits having been filed or served by plaintiffs, they consequently not having been required by the defendant to produce the affiants of the affidavits for cross-examination by defendant, plaintiffs would not, we think, in the event of their having prevailed, been entitled, under the statute, to tax the cost of procuring the attendance of their witnesses against defendant. Upon such hearing, in our opinion, neither party is entitled to recover witness fees, unless he is required to produce such witnesses as provided in the statute, or the witnesses are produced under an agreement, by the consent of both parties. In this case the conduct of both parties seems clearly to indicate an agreement or understanding that the hearing should be had, as it was, without a compliance by either party with the exigencies of section 4297 of the Revised Statutes. Assuming, as we think from the record we are authorized to do, these conditions, we must decide the question of costs as we think the conditions of this case equitably demand. The production of his witnesses by the defendant having, as we are permitted to presume, been agreed to

Points decided.

by plaintiffs, and the convenience of the plaintiffs having been served thereby, we deem it no more than just and equitable that the cost of their production should be borne by the plaintiffs, they having failed to establish their case. The objection that the mileage of witnesses in this case should be limited to the distance they could have been compelled to come upon process is not, we think, well taken. As before stated, the hearing seems to have been had by consent or agreement of the parties, and in such cases the provisions of the statute in that regard do not apply. (*Briggs v. Rumely*, 96 Iowa, 2902, 64 N. W. 784; *Alexander v. Harrison*, 2 Ind. App. 47, 28 N. E. 117.) It is evident the taking of depositions to be used on the hearing upon the order to show cause was impracticable. The judgment and the order of the district court is reversed, and the cause remanded to the district court, with instructions to allow the reporter's fees and cost of witnesses, as in the memorandum of defendant.

Sullivan, C. J., and Quarles, J., concur.

(February 7, 1898.)

McMILLAN v. WOOLEY.

[51 Pac. 1029.]

BILL OF REVIEW.—A bill of review will not lie to obtain a new trial, where the party seeking such relief has been guilty of any laches or blunders by which he lost his rights in the original action.

SAME—WHAT MUST BE ALLEGED.—In an equitable action commenced for the purpose of procuring a new trial of a former action, the complaint, designated in equity practice "bill of review" must affirmatively show that by reason of fraud, mistake or surprise, against which the complainant could not, by the use of reasonable diligence, have protected himself against in the original action, by motion for new trial, by application to vacate or modify the judgment on the ground of mistake, inadvertence, surprise or excusable neglect, made within six months after the adjournment of the term at which the judgment was rendered, or by appeal, thus showing a necessity of resorting to equity.

Argument for Appellant.

SAME—TIME WITHIN WHICH IT MUST BE FILED.—A bill of review must be filed within the time within which an appeal could be taken from the judgment sought to be reviewed.
(Syllabus by the court.)

APPEAL from District Court, Bear Lake County.

T. L. Glenn, for Appellant.

Section 4229 of the Revised Statutes in effect prolongs the term for a period of six months after its actual adjournment for the purposes of the statutory remedy, and as a bill in equity would not lie during the term, so it will not lie until the expiration of the six months provided by the statute, and this in obedience to the well-known rule that equity will not take jurisdiction where there is a speedy, complete and adequate remedy at law, but when that remedy has ceased to exist it will take jurisdiction where laches is not imputable to the party invoking its aid. (*Kitchum v. Crippen*, 37 Cal. 225; *Ede v. Hazen*, 61 Cal. 360; *In re Hudson*, 63 Cal. 454; *Thompson v. Laughlin*, 91 Cal. 313, 27 Pac. 752; *Eldred v. White*, 102 Cal. 600, 36 Pac. 944; *Freeman on Judgments*, sec. 500a.) The word "laches" in the law means unreasonable delay, and is the equivalent of the phrase "inexcusable neglect." In other words it is such delay as the law will not excuse. The law, however, does excuse delay when reason and common sense justify the delay, and in such case delay never ripens into laches. (*Livestock Co. v. Thompson and Hall*, 41 Cal. 63; *Hart v. Gayenchie*, 56 Cal. 429; *Craig v. Investment Co.*, 101 Cal. 122, 35 Pac. 558; *Douglass v. Todd*, 96 Cal. 655, 31 Am. St. Rep. 247, 31 Pac. 623; *Bast v. Hyson*, 6 Wash. 170, 32 Pac. 997; *Sanders v. Hall*, 37 Kan. 271, 15 Pac. 197; *Witeside v. Logan*, 7 Mont. 373, 17 Pac. 34.) In the case of *Taylor v. California Stage Co.*, 6 Cal. 230, a witness for the plaintiff was asked on cross-examination if he had not made a different statement out of court, to which he answered that he had not. On motion for a new trial defendant alleged that it was taken by surprise by the testimony of this witness. The court say "if he had made the statement to the defendant and thus misled him," and defendant had relied on the statement, it might have been ground for a new trial. In the case at bar

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a statement was made to the plaintiff on which he relied, on which he acted, and we are now told it was negligence so to do. (*Case v. Coddling*, 38 Cal. 194; *Patterson v. Elly*, 19 Cal. 29; *Gray v. Hawley*, 21 Cal. 397; *Rodriguez v. Comstock*, 24 Cal. 85.)

John T. Morgan, for Respondent.

A court of equity will not grant a new trial in an action at law where the applicant knew of the condition of the judgment against him in the law action in time to have moved for a new trial in the law cause. (*Mastick v. Thorp*, 29 Cal. 444.) If a party loses the right to try a material issue through his own neglect or laches, equity will not relieve him. (*Boston v. Haynes*, 33 Cal. 31.) He has neglected two opportunities of correcting his judgment or reversing it on appeal in this action at law. Equity now, after the lapse of two years, will not interfere. (*Neal v. Byers*, 45 Cal. 234.) Where the evidence might have been produced on the trial by the exercise of reasonable diligence a new trial will not be granted at law, much less in equity. (*Moran v. Abbey*, 63 Cal. 56; *Hendy v. Desmond*, 62 Cal. 260.) In order to get a new trial at law on the ground of newly discovered evidence, the party must produce the affidavits of the witnesses, showing what they will swear to; his own sworn statement will not do. (*Arnold v. Skaggs*, 35 Cal. 684.)

QUARLES, J.—The defendants in this case filed a general demurrer to the complaint, which was sustained by the district court. From the judgment dismissing the action the plaintiff appeals. The facts as they appear in the complaint are as follows: Hyrum S. Wooley executed his promissory note to plaintiff for the sum of \$4,600, on the twenty-seventh day of February, 1894, and on the same day said Wooley and his wife executed a mortgage to the plaintiff on eight lots or parcels of land, to secure the payment of said note at its maturity, August 27, 1894. The mortgage covered some community property, the homestead, and one parcel of separate property of the wife. December 18, 1894, the plaintiff commenced an action in the district court of the fifth district, in and for Bear Lake county,

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the county in which said property is situated, for the foreclosure of the said mortgage. To this action the defendant, Hyrum S. Wooley, made default, but his wife, Minerva M. Wooley, filed her demurrer to the said complaint, on the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was sustained by the district court, on the ground "that the certificate of acknowledgment of Minerva M. Wooley attached to the said mortgage deed did not conform to the requirements of the law in such cases made and provided, and that the same was defective and void (she, the said Minerva M. Wooley, being then and there a married woman, as alleged in said cause), in this, to wit, that the officer taking the acknowledgment of said Minerva M. Wooley did not certify that he made her acquainted with the contents of said mortgage deed on an examination without the hearing of her husband," whereupon the said district court rendered judgment, dismissing the said action as to the said defendant Minerva M. Wooley, on the twenty-second day of August, 1895. On the twenty-fifth day of February, 1896, the court found that there was due from said Hyrum S. Wooley to plaintiff, on said mortgage debt, the sum of \$5,600, and rendered judgment foreclosing the said mortgage on the said community property, but refusing to foreclose it on said homestead and separate property of Mrs. Wooley. Thereafter the said community property was sold under the said decree, the proceeds of which paid the costs and disbursements and \$769.45 of the principal debt, leaving a balance due of \$4,592, with interest thereon from April 18, 1896, still unpaid. The said mortgage was acknowledged by Wooley and wife before Douglas Hix, then probate judge of said Bear Lake county. The said foreclosure action was brought by the plaintiff through his attorneys, Bell & Breen and Hart & Sons, who appeared at the trial for the said plaintiff. The attorney who represents the plaintiff in this action does not appear to have been an attorney for the plaintiff in the said foreclosure case; nor does it appear in the complaint in this action when said attorney was employed for or on behalf of the said plaintiff; yet it is alleged in said complaint in this action that "the plaintiff, through and by his attorney T. L. Glenn, immediately after the making and

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entering of said decision dismissing the said cause, carefully and diligently inquired, through and by his said attorney T. L. Glenn, of the said Douglas Hix, the officer taking and certifying the acknowledgment aforesaid, as to whether he had, on an examination without the hearing of her husband, made her acquainted with the contents of the said instrument, and if upon such examination, and without the hearing of her husband, she acknowledged that she executed said instrument, and that she wished not to retract the execution thereof, whereupon the said Douglas Hix informed said T. L. Glenn, attorney for the plaintiff, as aforesaid, that Hyrum S. Wooley, the husband of the said Minerva M. Wooley, was at all the times present and within the hearing of the said Minerva M. Wooley while he took her acknowledgment, and certified the same"; that, relying upon the said statement of said Hix, plaintiff commenced, February 5, 1896, an action against said officer and his sureties on his official bond, to recover damages sustained by plaintiff on account of the gross negligence of the said officer in taking and certifying a void acknowledgment of said Mrs. Wooley to the said mortgage; that this last-named cause came on for trial on September 2, 1896, and on the said trial said Hix testified that he informed Mrs. Wooley of the contents of the said mortgage on examination apart from and without the hearing of her said husband, whereupon she acknowledged to him that she executed the same, and that she did not wish to retract the execution of the same; that said action was decided in favor of the defendants, said Hix and his sureties, and judgment rendered in their favor; that the plaintiff was misled by the said statements of Douglas Hix to the said Glenn, attorney for the plaintiff, touching the acknowledgment of said mortgage by Mrs. Wooley, for which reason he did not amend his complaint in the said foreclosure action so as to seek a reformation of the certificate of acknowledgment of Mrs. Wooley to the said mortgage; that the only defect in said certificate of acknowledgment was that it failed to state that said officer made Mrs. Wooley acquainted with the contents of said mortgage on examination separate and apart from and without the hearing of her husband, which was actually done, as plaintiff can now prove by said Douglas Hix

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and one William Pendry, residents of said Bear Lake county. The foregoing was substantially the facts stated in the complaint in this action, which was filed in the district court on the twenty-sixth day of January, 1896. The prayer to said complaint is in the following words and figures, to wit: "Wherefore plaintiff prays that the judgment on the demurrer of Minerva M. Wooley in the foreclosure proceedings hereinbefore set forth, dismissing the said cause as to her, be set aside and held for naught; that the certificate of acknowledgment to the mortgage deed of said Hyrum S. Wooley and Minerva M. Wooley be amended and reformed to conform to the facts as set forth herein; that plaintiff have judgment against the defendant Hyrum S. Wooley for the sum of four thousand five hundred and ninety-two dollars (\$4,592), with interest thereon from the eighteenth day of April, 1896, at the rate of eight per cent per annum; that that piece or parcel of land herein described as the separate property of Minerva M. Wooley and the homestead of defendants be sold according to law; and that the proceeds be applied to the payment of the judgment to be found herein; or, if that cannot be done in this case, that the said judgment of dismissal, as in this prayer first above described, be vacated, set aside, and held for naught; and that this plaintiff have leave to amend his complaint in the said foreclosure suit so as to set up the facts touching the execution of the mortgage deed by the said Minerva M. Wooley, and the certification of her acknowledgment thereto so as to reform the same to conform to the law in such cases made and provided, and for such other and proper relief as in equity he may be entitled to."

The only question in this case that we are called on to decide is the correctness of the lower court in sustaining the demurrer to the complaint. It will be seen that the complaint does not set forth *in haec verba* the certificate of acknowledgment to the said mortgage. We are unable to say from the record before us whether the said certificate absolutely failed to state whether the officer informed Mrs. Wooley of the contents of said instrument, or whether the allegation in the complaint that it did not show that the officer informed her of the contents of the instrument while her husband was absent is an actual fact, or is the

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conclusion of the plaintiff, based on the construction of the said certificate. We have recently had before us two cases in which parties construed the certificate of acknowledgment to be defective, when in point of fact it was awkwardly drawn, but substantially complied with the requirements of the statute. If the conclusion of the district court that said certificate was void as to Mrs. Wooley was based on an erroneous construction of such certificate, then the judgment dismissing the action as to Mrs. Wooley was erroneous. But inasmuch as the plaintiff did not bring into court the original complaint and demurrer in the foreclosure case, and the said mortgage and certificate of acknowledgment thereto, which was doubtless a part of said complaint, as the sufficiency of the certificate was decided on demurrer to the complaint, we are not able to say whether said certificate was sufficient, or whether it was erroneously held insufficient, and will not attempt to pass on either of those questions. If, however, the said certificate was sufficient, but, by an erroneous construction, held to be insufficient, the plaintiff's remedy was by appeal. If, however, the said certificate was void as to Mrs. Wooley, then we cannot conceive of any rule of law or practice which would permit the officer taking it to contradict the certificate, or avoid liability for failing to take and certify a valid acknowledgment of said mortgage by Mrs. Wooley. From the statements in the complaint it may be reasonably inferred that either the judgment dismissing the foreclosure action as to Mrs. Wooley, or the judgment in favor of the defendants in the suit brought by the plaintiff against the officer and his sureties, is erroneous. If the acknowledgment of Mrs. Wooley was sufficient, plaintiff should have had judgment foreclosing the mortgage upon all of the mortgaged property. If the certificate showed a void acknowledgment, and the declarations of the officer taking it made to the plaintiff's attorney showed it to be void, and showed that it was futile to seek a reformation of the said certificate, then we know of no rule of law permitting him to escape liability to the plaintiff. Plaintiff should have succeeded in one or the other of the actions, and his failure to do so must have been owing to his own negligence, or owing to the incompetency and neglect of his at-

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torney in one or the other of the actions, in neither of which events can he obtain relief in this action.

There is no allegation of fraud against the defendants. The suit first brought was in equity. This is not an action brought by bill of review to obtain a review of a judgment obtained at law by fraud, or through mistake, accident or surprise. The evident purpose of this action is to obtain an additional decree foreclosing said mortgage as to two parcels of land after it had been foreclosed as to several others. Litigation should not be interminable, but judgments must be treated as final, as a general rule. To obtain relief in this case, the plaintiff should have shown that in neither of the former suits mentioned in this complaint is there error apparent of record justifying a reversal. He had not done so. His statements show that a wrong has been done him. They do not show that he is not guilty of laches in protecting his rights, but a fair inference from the allegations of the complaint is that he failed to obtain full relief by reason of an erroneous judgment in one of two cases from which he failed to appeal. In this case he asks a foreclosure of a mortgage in parcels, and asks the court to reform an instrument, by changing its terms so as to make it conform to the truth, and refuses to bring the instrument into court so that the court can see the defect, and see how to reform it by changing its terms so as to make it speak the truth. This may be correct practice, but we doubt it. Having sold a portion of the mortgaged property under the decree of foreclosure, we do not see how the cause could be opened, the former decree annulled, and the parties placed *in statu quo*.

To obtain relief by a bill of review from a judgment rendered in an equitable action foreclosing a mortgage, the plaintiff must, to state a cause of action, affirmatively show in his complaint that such judgment was the result of fraud, accident or mistake, which he could not, by due diligence, protect himself against in the original action. Such showing is not made here, and we think the demurrer was properly sustained. (See *Boston v. Haynes*, 33 Cal. 31; *Mastick v. Thorp*, 29 Cal. 445; *Riddle v. Baker*, 13 Cal. 295.)

Points decided.

We think, too, that this action was filed too late. The supreme court of California in one case said: "The repose of society demands that, when a controversy has been ended by the final judgment of a court, it shall not be reopened except within a reasonable time; and, in respect to bills of review, courts of equity have adopted, as a reasonable period within which they may be prosecuted, the time allowed by law for the prosecution of an appeal or writ of error." (See *Allen v. Curry*, 41 Cal. 318, and authorities there cited.) Under our code, the cases in which a bill of review will lie are very limited. In order to secure a new trial of a case determined in another action, by bill of review, the plaintiff must show, by his complaint, a good cause or ground for granting him a new trial in the action; that time for applying for the relief under the provisions relating to new trials, or to have the judgment set aside on the ground of mistake, surprise or excusable neglect, under section 4229 of the Revised Statutes, has expired; that he could not obtain the relief by appeal; that he has been guilty of no laches or blunders in protecting his rights; and that, by reason of fraud, mistake or surprise over which he had no control, he is entitled to a new trial, which, only by the interposition of equity, he can or could have obtained by the exercise of reasonable diligence. The judgment of the lower court is affirmed, with costs to the respondents.

Sullivan, C. J., and Huston, J., concur.

(February 8, 1898.)

STEUNENBERG, GOVERNOR, v. STORER, STATE TREASURER.

[52 Pac. 14.]

CAPITOL BUILDING FUND.—Under the provisions of an act providing for the erection of a capitol building at Boise City and the issuance of state bonds and creating a capitol building fund out of which said bonds and interest thereon were to be paid (see Special and Local Laws of Idaho, p. 14), it was not intended to create a permanent capitol building fund.

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TEMPORARY STATUTE—AUDITOR—TREASURER.—Said fund was temporary and only to continue until said bonds and interest were fully paid, and after that the revenue appropriated to said fund must be turned into the general fund of the state, until otherwise provided by law.

(Syllabus by the court.)

An original proceeding by writ of mandate.

Hawley & Puckett and Frank A. Fenn, for Petitioner.

The statutes bearing upon the question are Revised Statutes, section 232, Revised Statutes, section 1640, Special and Local Laws, sections 32-45. (1st Sess. Laws, 14.) The only question that is before the court is upon the construction of the statutes referred to. It is an undeniable rule in the construction of statutes that the legislative intent must govern. (Sutherland on Statutory Construction, 219, 234, 237, 245, 246; Endlich on Interpretation of Statutes, sec. 295; *Smith v. Randall*, 6 Cal. 47, 65 Am. Dec. 475; *Bell v. New York*, 105 N. Y. 139, 11 N. E. 495; *Chandler v. Lee*, 1 Idaho, 349, and authorities cited.) If possible a statute must be so construed as to make it effect the purpose for which it was intended. (Endlich on Interpretation of Statutes, sec. 29, p. 37.) The purpose intended to be accomplished by the act is justly looked to in order to determine the true construction of the act. (Endlich on Interpretation of Statutes, sec. 27, p. 36; Sutherland on Statutory Construction, secs. 219, 241; *Leadville etc. Co. v. City of Leadville*, 9 Colo. App. 400, 49 Pac. 268; *Henderson v. Mayor*, 92 U. S. 259-268; *Sheriff v. Parish*, 37 La. Ann. 788, 789; *Big Black Creek Imp. Co. v. Commonwealth*, 94 Pa. St. 450-455; *Tonnole v. Hall*, 4 N. Y. 140-144.) A temporary statute continues in force, unless it be sooner repealed, until the time for which it is made expires. (9 Bacon's Abridgment, tit. "Statutes," subd. "D," p. 223.) A temporary act operates till its time expires. (Sutherland on Statutory Construction, sec. 136; *Brown v. Barry*, 3 Dall. 365-367.)

SULLIVAN, C. J.—This is an original action, brought in this court by Frank Steunenberg, governor of Idaho, against George H. Storer, treasurer of the state, to compel him to place

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in the general fund of the state the amount of money held by him in what is known as the "Capitol Building Fund." It appears that the legislature of the territory of Idaho, in 1885, authorized the issuance of the bonds of the territory, to the amount of \$80,000, for the purpose of erecting a capitol building in Boise City, and provided a fund to pay the principal and interest on said bonds, and also provided that the territorial portion of the money to be derived from licenses collected should be placed in a fund to be called the "Capitol Building Fund," and to be used in the payment of said bonds and interest. (See Sess. Laws 1885, p. 62.) In 1891 an act was passed directing the state treasurer to invest the surplus moneys of said capitol building fund in state warrants. (See Sess. Laws 1891, p. 14.) It is alleged that said bonds and interest are fully paid, and that there are now over \$17,000 in said capitol building fund, and that the said treasurer refuses either to pay said money into the general fund or to invest it in state warrants. The alternative writ of mandate was issued. The defendant appeared, and demurred to the petition, on the ground that it did not state a cause of action, and moved to quash the writ for the same reason. The demurrer was orally argued by J. H. Hawley and Frank A. Fenn, Esqs., on behalf of the plaintiff, and by S. L. McFarland, Esq., on behalf of the defendant. R. E. McFarland, attorney general, appeared, and stated to the court that as this was a suit between two state officers, and as he had advised the defendant as to his duty in the matter in controversy, he declined to appear for either plaintiff or defendant; but, during the hearing, the attorney general appeared *amicus curiae*, and made an argument, in which he took the position that the defendant was not authorized either to turn the fund in dispute into the general fund or to invest the same in state warrants. The contention of the defendant is that no limitation is placed upon the life or existence of the capitol building fund created by section 38, page 14, Special and Local Laws of Idaho (see, also, Laws 13th Sess., p. 62); and that, as the indebtedness which said fund was created to liquidate has all been paid, he is not authorized to invest the surplus of said fund in warrants, and for that reason his duty is to hold said

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and intact until the legislature shall make proper disposition of it. In the determination of the question involved, certain provisions of the statute must be considered.

Section 232 of the Revised Statutes declares of what moneys the general fund of the state shall consist, and is as follows:

"Sec. 232. The general fund consists of moneys received to the treasury and not specially appropriated to any other fund."

Section 1640 of the Revised Statutes requires one-tenth of all receipts from licenses to be paid into the state treasury; and the act creating the capitol building fund provides that the treasurer shall set apart all moneys received by him on account of licenses of every kind and description, collected under the revenue laws of the territory, and that the same (with rents derived from the capitol building) shall constitute the capitol building fund. Section 38, page 14 of the Special and Local Laws of Idaho, is as follows:

"Sec. 38 (sec. 7). For the purpose of creating a fund to pay the interest coupons and the principal of said bonds, the territorial treasurer is hereby empowered and directed, from and after the passage of this act, to set apart all moneys that shall be received by him on account of licenses of every kind and description collected under the revenue laws of the territory, and all rents that may be derived from said building, and the same shall constitute a separate and distinct fund to be known as the 'capitol building fund.' And the territorial treasurer shall pay the interest on said bonds, when due, out of said fund, making the coupons as his vouchers therefor. And after the expiration of ten years from the issuance of any of said bonds, whenever there shall be \$5,000 or more in said fund provided for in this section over and above the amount required for the payment of interest coupons due, or to become due within the next ensuing six months, the treasurer shall use such surplus money in the redemption of said bonds according to the number and date of their issue, of which the treasurer shall give notice by publication once a week in some newspaper published in the county of Ada, and from the date of the last publication of such notice, the bonds proposed to be redeemed shall cease to draw

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interest; and if any such bonds shall not be presented within sixty days from the date of the last publication of such notice the treasurer shall apply the money for the redemption of bonds next in order of the number and date of their issue." (See, also, same section, Laws 13th Sess., p. 62.)

At the first session of the legislature of this state it appears that a considerable surplus had accumulated in said capitol building fund, and it being desirous to invest said surplus in state warrants, and thereby save to the state interest accumulating on such warrants, the following act was passed.

"An act to authorize and require the state treasurer to invest the surplus moneys of the capitol building fund in state warrants.

"Be it enacted by the legislature of the state of Idaho:

"Section 1. Whereas, prior to the time when the capitol building bonds, issued under section 37 of the Special and Local Laws, shall become subject to redemption as provided by said section, the amount of money in the capitol building fund provided for by section 38 of the Special and Local Laws, shall exceed the amount required for the payment of the interest coupons of said bonds due or to become due within the next ensuing twelve (12) months, the state treasurer shall use such surplus in payment of any warrant drawn upon him by the state auditor and presented for payment and not paid for want of money in the fund upon which they are drawn properly applicable thereto, and shall register and indorse such warrants as provided by section 238 of the Revised Statutes and place the same so indorsed to the credit of the capitol building fund, and such warrants shall bear interest and be payable in due course as other outstanding warrants; and when paid the principal and interest thereof shall belong to the capitol building fund and shall be in like manner reinvested until said bonds become redeemable as aforesaid.

"Sec. 2. There now being a large surplus idle and unproductive in said capitol building fund and an insufficient amount in the general fund of the treasury to pay warrants as presented, an emergency exists, and this act shall go into effect from and after its passage.

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“Approved January 17, 1891.” (See Sess. Laws 1891, p. 14.)

The language of said last-mentioned act seems to imply that the investment of the surplus of said fund in state warrants was only to be made until said bonds and interest were redeemed and paid. It is admitted by the pleadings that said bonds, with interest thereon, were fully paid in 1896, and that there is no indebtedness remaining unpaid which said fund was created to pay. The language used in said last-mentioned act commands the investment of said surplus in state warrants until the bonds and interest therein referred to are paid or become redeemable. It does not direct that any money remaining in said fund after said bonds and interest are paid shall be invested in state warrants. In determining the issue in this case, we must consider the sections of the statutes above cited. The words used in said last-cited act commands the investment of said surplus, in state warrants, until the said bonds become redeemable. There it leaves the matter. It does not direct that any money remaining in said fund after said bonds and interest had been paid shall be invested in state warrants. All moneys paid into the state treasury, derived from licenses, were turned into said capitol building fund, and constituted substantially all of said fund, except a few dollars received for rental of a portion of the capitol building. The state's proportion of the revenue arising from licenses had been used for other territorial purposes prior to the creation of said capitol building fund. The evident intention of the legislature in creating said capitol building fund was to provide for the payment of the bonds authorized to be issued by said act for the erection of a capitol building at Boise City. (See Special and Local Laws of Idaho, secs. 32-45, p. 14.) It was not the intention to create a permanent fund. When the purpose for which said fund had been established was accomplished, there was no necessity for its existence longer; and it was not the intention of the legislature creating said fund that the treasurer should pass to said fund any money after said bonds and interest thereon had been paid and redeemed. Said fund could only be used for a specific purpose, to wit, that of paying said bonds. The

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intention was to divert the money derived from licenses from the general fund, and use it in the payment of said bonds, and, when they were redeemed, to cease to so divert it. The act creating said fund is plain. Section 38 declares: "For the purpose of creating a fund to pay the interest coupons and the principal of said bonds the territorial treasurer is hereby empowered and directed from and after the passage of this act to set apart all moneys that shall be received by him on account of licenses," etc. Said capitol fund was created for a temporary purpose. That purpose having been fully accomplished, the fund ceased to exist, and thereafter the treasurer was not authorized, under the provisions of said section 38, to place any money therein. The reason for creating said fund had ceased, and the money which supplied it must go back to the fund from which it was diverted, unless otherwise provided by law. Said statute was a temporary one. It was limited in its duration at the time of its enactment. It created a fund for the payment of the principal and interest on certain bonds, and continued in force until such principal and interest were fully paid, and no longer.

It is contended by counsel for defendant that under the provisions of section 206 of the Revised Statutes, the auditor must direct the treasurer into which of the various funds established by law he must place the revenue collected by the state; that the auditor has directed the defendant to place the state's portion of all money derived from licenses in said capitol building fund, and that is the end of the matter so far as the treasury is concerned. There is nothing in that contention. As said fund was not a permanent one, and as the purpose for which it was created or established has been accomplished, the auditor had no authority to direct the treasurer to place money therein. If the auditor directs the treasurer to place money in a fund contrary to law, the treasurer should decline to do so. And again, it is provided by said section 38, *supra*, that, "for the purpose of creating a fund to pay the interest coupons and the principal of said bonds," the treasurer is directed to set apart all moneys received on account of licenses. On the payment of said bonds and interest, the treasurer's authority to place the

Points decided.

money received from licenses in the said fund ceased. Thereafter the auditor had no authority to even suggest that the revenue received from licenses be placed in said fund, but should have suggested or directed that the money derived from licenses and rents of capitol building be placed in the general fund of the state. The peremptory writ directing the defendant to place all moneys now in said capitol building fund in the general fund of the state must issue, and it is so ordered. It is also ordered that no costs shall be collected by the clerk in this suit.

Quarles and Huston, JJ., concur.

(February 24, 1898.)

ANDERSON, STATE AUDITOR, v. LEWIS, SECRETARY OF
STATE.

[52 Pac. 163.]

APPROPRIATION FOR PRINTING AND BINDING JOURNALS.—Where an appropriation is made by the legislature for "publishing the journals of the Senate and House and the Sessions Laws," such act is intended only to provide compensation for the printing and binding thereof.

COPIES OF LAWS AND JOURNALS—SECRETARY'S DUTY TO PREPARE.—It is part of the official duty of the Secretary of State to prepare the copies of the laws and journals for the printer.

FEES PAID TO SECRETARY BELONG TO STATE TREASURY.—Where the Secretary of State has received fees for making such copies, such fees are required to be paid into the state treasury by the Secretary of State under the provisions of section 19, article 4 of the constitution.

SAME—AS TO FURNISHING COPIES TO PRINTING COMPANY.—Where the Secretary of State makes a contract with a printing company, to publish the laws and journals by the terms of which contract the secretary is to receive a certain portion of the contract price for the preparation of the copies for the printer, such contract is within the prohibitions of section 365 of the Revised Statutes of Idaho.

(Syllabus by the court.)

An original proceeding by *mandamus*.

Argument for Plaintiff.

Samuel H. Hays and Henry Z. Johnson, for Plaintiff.

Section 209 of the Revised Statutes provides that whenever any person has received moneys, or has collected moneys belonging to the state and fails to account therefor, or who fails to pay into the treasury any money belonging to the state, upon being required to do so by the auditor, within twenty days after such requisition, the auditor must state an account with such person charging twenty-five per cent damages and interest at ten per cent. *Mandamus* is the proper remedy in this case. (*State v. Stanton*, 14 Utah, 180, 46 Pac. 1109; *State v. Roderick*, 23 Neb. 505, 37 N. W. 77.) Section 190 of the Revised Statutes makes the secretary the legal custodian of the laws and journals. Section 19, article 4 of the constitution fixes, among other things, the salary of the Secretary of State at \$1,800 per annum and provides that the compensations enumerated shall be in full for all services by said officers respectively rendered in any official capacity or employment whatever during their respective terms of office. Subdivision 7, section 191 of the Revised Statutes makes it the official duty of the secretary to furnish on demand to any person paying the fees therefor a certified copy of all or any part of any law or record in his office. Since it is the secretary's duty to make copies of the laws and journals when requested, we conclude that it is an "official duty," and since he is entitled to certain fees therefor, and has received them, and has not paid them into the state treasury, his delinquency is fixed, since the constitution provides that "no officer shall receive for the performance of any official duty any fee for his own use," but all fees must be paid into the state treasury. We contend that the defendant, so far as it relates to any of the matters of his office, has no "private or personal capacity." He is Secretary of State both during and after office hours, including nights and Sundays. (*Ring v. Devlin*, 68 Wis. 384, 32 N. W. 121; *Mechem on Public Officers*, secs. 839, 840; *State ex rel. Frontier Co. v. Kelley*, 30 Neb. 574, 46 N. W. 714; *Ada County v. Ryals*, 4 Idaho, 365, 39 Pac. 556; *State v. McFetridge*, 84 Wis. 473, 501, 51 N. W. 1, 998; *State v. Leidtke*, 12 Neb. 171, 10 N. W. 703.) Defendant denies certifying to the laws but on succeeding page

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196 of the 1897 Laws appears his official certificate, with seal and signature, of which this court must take judicial notice. Having made this certificate, he was entitled to the full amount of the fee for copying the laws. (See *Potter v. Talkington*, 5 Idaho, 316, 49 Pac. 14; *Yates v. National Home*, 103 U. S. 674; *Banks v. State*, 60 Md. 305; *Lucas v. Allen*, 80 Ky. 681; *People v. Township*, 11 Mich. 221.)

N. M. Ruick, for Defendant.

The real question and the all-important one raised by the demurrer to the answer in this case is: Was the defendant, as Secretary of State, required by law to perform the services which were, concededly, performed by him in this case? Were the services performed by the defendant, as and in the manner as set forth in his answer, performed by him in his official capacity? In this case the contract to publish the laws and journals was let to the Sentinel Printing Company, and, by the terms of their contract, they were to transcribe, compile, publish and bind the same, in consideration of the sum of \$2,000. It was immaterial as to how or from whom the "copy" was obtained or through whom it was obtained, so that it was procured complete and in form to be set up by the printer; since the records of the office of Secretary of State are open to the public, this copy could as well be procured by one as another, and it did not require this copy to be certified to answer the purpose sought in supplying the printer therewith. The fact should not be lost sight of that this "publishing" was being done for, on behalf of and at the request of the state, and was incidental to procuring to be published such laws and journals. The furnishing of this copy to the printer or publisher, at his request was not an act in any sense sufficient, inasmuch as it was not a duty required by law of any official, in an instance like this, where the laws and journals are being published by and for the state. We submit therefore that the defendant, as Secretary of State, not being required by law to perform these services, and the services being such as could have been performed with equal facility and utility by a private individual, that the services so performed by the defendant were wholly unofficial and that the

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compensation received therefor was in no sense an official compensation or "fee" required by the constitution to be turned into the state treasury. As cases and authorities upon the point that an officer is entitled to extra compensation for services performed by him, which services are extraofficial and not required of him by virtue of his office, we cite the following: 19 Am. & Eng. Ency. of Law, 530, note 4; *Love v. Baehr*, 47 Cal. 364; *Curtis v. Sacramento etc.*, 13 Cal. 290; *Evans v. Trenton*, 24 N. J. L. 764; *Burroughs v. Board*, 29 Kan. 196; *McBride v. City of Grand Rapids*, 47 Mich. 236, 10 N. W. 353; *Niles v. Muzzy*, 33 Mich. 61, 20 Am. Rep. 670.

HUSTON, J.—The facts are, as they appear from the record, in substance as follows: In the appropriations for current expenses of the state government, passed by the fourth session of the Idaho legislature, there was included in the appropriations for Secretary of State, for "publishing House and Senate journals and Session Laws of 1897, \$2,000." The Secretary of State made a contract with the Sentinel Printing Company, through its agent or manager, for the printing, binding, etc., of said laws and journals, for the sum of \$2,000. It appears that of said sum of \$2,000 the sum of \$675 was paid to the Secretary of State, for copying and preparing said laws and journals for the printer. It is claimed by the petitioner that the sum so received by the Secretary of State was so received as fees by virtue of his office, and, as such, should have been paid into the treasury of the state by the Secretary of State, under the provisions of section 19 of article 4 of the constitution of Idaho. Said section 19 provides, *inter alia*, that the Secretary of State shall receive a salary of \$1,800 per annum, and, further, "the compensation enumerated shall be in full for all services by said officers, respectively, rendered in any official capacity or employment whatever during their respective terms of office. No officer named in this section shall receive, for the performance of any official duty any fee for his own use; but all fees fixed by law for the performance by either of them of any official duty shall be collected in advance, and deposited with the state treasurer quarterly to the credit of the state." It is contended by defendant that the labor so performed by him was not done in his

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official capacity, and that it was done out of office hours, and that, therefore, the compensation received by him therefor does not come within the provisions of said section 19 of article 4 of the constitution. We do not think this contention of the defendant is maintainable.

The Secretary of State is made by law the custodian of the laws passed by the legislature and of the journals of each house thereof. It is made his duty to publish the same, and this duty, it seems to us, includes, of necessity, the preparation thereof for the hands of the printer. This has been the uniform course, not only under the state government, as we are informed, but was that always pursued under the territorial organization by the secretary of the territory, to whose duties the Secretary of State mainly succeeds. If any other course has been pursued under the state government, we are not aware of it, and it was certainly unwarranted. The laws, when printed, must be authenticated by the certificate of the Secretary of State, under the seal of the state, of which the secretary is also the custodian. That the duty to publish the laws does not include the preparation thereof, for printing and publishing, seems to us inconsistent with reason or precedent. This assumes that it was not the duty of the secretary to prepare the copies of the law for the printer, but that, in the letting of the contract, it was the understanding that the expense of making the necessary copies, indexes, etc., was to be borne by the printing company having the contract. Such copies must be made in the secretary's office, and be verified by him. They must be made by him, or under his direction and supervision, and he could only do these things in his official capacity, and the fees chargeable therefor are fixed by law, and are required to be paid into the state treasury. It is begging the question to say that the printer could put a corps of copyists into the office of the secretary to perform such work, for if the secretary declined, as well he might, to certify or authenticate copies so made, the labor would be thrown away. The law should not receive an interpretation which would lead to such invidious and disturbing conditions.

It would be idle to say that because the word "publishing," in its strictest sense, does not include "printing," therefore the ap-

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propriation made by the legislature for the publishing "of the laws and journals did not include the expense of printing"; but such a conclusion would not, it seems to us, be any more fallacious than the construction contended for by defendant. The law must be so construed as to carry out the manifest intention of the lawmakers; and, in construing the law upon this subject, we must take into consideration both the provisions of the constitution and the laws applicable thereto, and from these determine the intention of the lawmakers; and, so taking them, it is palpable to our minds that it was intended that the salary allowed the officer should be in full compensation for all services rendered by him by virtue of his office or in his official capacity.

We have examined all of the authorities cited, and we believe the views we have reached are sustained fully by all the cases pertinent to the question under consideration. The case of *State v. Liedtke*, 12 Neb. 171, 10 N. W. 703, cited by defendant, is particularly in point, and arose upon circumstances very like those in the case under consideration, and the decision was upon a constitutional provision similar to section 19 of article 4 of the Idaho constitution.

There is another feature of this case, and the law applicable thereto, to which it is as well, perhaps, to call attention. It is conceded that the amount paid the defendant was a part of the consideration expressed in the contract made with the Sentinel Printing Company, and that the consideration expressed in said contract was fixed in view of and with relation to the sum to be paid to the defendant for the services performed by him. This, we think, was clearly within the prohibition expressed in section 365 of the Revised Statutes of this state. "Members of the legislature, territorial, county, city, district and precinct officers, must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members." The damages allowed by section 209 of the Revised Statutes, are intended as a penalty for a willful dereliction, or refusal by the officer upon whom demand is made; and as it is apparent that the action of the defendant was not attributed to any design or desire on his part to avoid a duty, or

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misinterpret the law to his own advantage, and, moreover, as he alleges in his answer that he acted in the matter throughout upon the advice of his proper legal adviser, the attorney general, we are not inclined to enforce the penalty of twenty-five per cent damages or the interest. The writ of mandate will issue commanding the defendant to pay into the state treasury the sum of \$675, so received by him as aforesaid, on or before the first Monday of April, 1898. The clerk is directed to charge no fees in this case.

Sullivan, C. J., and Quarles, J., concur.

(February 25, 1898.)

BLAINE COUNTY v. LINCOLN COUNTY.

[52 Pac. 165.]

BOARD OF ACCOUNTANTS—CLERICAL DUTIES.—Accountants appointed under the provisions of an act creating a new county out of part of the territory of another county, to apportion the indebtedness of the old county between it and the new county, upon a given basis, are not vested with either legislative or judicial functions, but perform mere clerical duties. *Blaine County v. Smith*, 5 Idaho, 255, 48 Pac. 286, cited and approved.

SAME—ACTS OF BOARD NOT FINAL.—The acts of a board of accountants appointed to apportion a debt between two counties upon a given basis, is not final, but may be impeached on the ground of fraud or mistake.

STATUTORY LIABILITY OF NEWLY CREATED COUNTY—JURISDICTION OF COURT TO IMPEACH REPORT OF ACCOUNTANTS.—A board of accountants provided by statute to apportion a certain indebtedness between two counties, on a given basis, acted and, in acting, failed to carry out the direction of such statute, by which failure on their part one county was defrauded of a large sum of money, which should, under the provisions of such statute, be paid to it by the other county. *Held*, that in such case, the courts have jurisdiction to grant relief. *Held*, further, that it was the duty of said board to carry out the provisions of the statute under which it was created, and in case of failure by such board to perform its duties, the court must, in a proper action therefor, grant relief by rendering such judgment as will carry out the will of the legislature as expressed in said statute.

(Syllabus by the court.)

Argument for Appellant.

APPEAL from District Court, Ada County.

Selden B. Kingsbury and Lyttleton Price, for Appellant.

Have the courts jurisdiction of this action? That is to say, has the plaintiff a right to call upon the courts to enforce this obligation according to the intent and purposes of the legislature notwithstanding the provision for the appointment of the accountants to compute the amount of it? (*Custer Co. v. Yellowstone Co.*, 6 Mont. 39, 9 Pac. 586; *Grant County v. Lake County*, 17 Or. 453, 21 Pac. 447; *Brewster v. Harwick*, 4 Mass. 278; *Forrest County v. Langlade County*, 78 Wis. 605, 45 N. W. 598; *Contra Costa County v. Alameda County*, 26 Cal. 642; *Rogers v. Hayes*, 3 Idaho, 597, 32 Pac. 259; *Nevada v. Board of Ormsby Co.*, 7 Nev. 392; *Morrow Co. v. Hendryx*, 14 Or. 397, 12 Pac. 806; *Nez Percés Co. v. Latah Co.*, 3 Idaho, 413, 31 Pac. 800; *People v. Hester*, 6 Cal. 679; *People v. Supervisors Eldorado Co.*, 8 Cal. 58; *Morgan v. Beloit*, 7 Wall. 613.) A coupon is an express contract for the direct payment to bearer of a certain sum of money at a certain time, and generally at a certain place. In this instance it was payable in the city of New York. It is a specific contract complete in itself, negotiable in form and possessing every attribute of commercial paper. When overdue, being an absolute promise to pay a certain sum of money on the date named, it bears interest from the date of its maturity. (5 Thompson on Corporations, 6107, 6108, 6111-6114; note on coupons, etc., 64 Am. Dec. 428; *Clark v. Iowa City*, 20 Wall. 583-589; *Morris Canal Co. v. Fisher*, 1 Stock. Ch. 667, 64 Am. Dec. 428; *Welsh v. First Div. etc. R. R.*, 25 Minn. 320; 2 Parsons on Bills and Notes, 115, 393; *Gelpcke v. Dubuque*, 1 Wall. 206; *Thompson v. Lee County*, 3 Wall. 327; *City of Aurora v. West*, 7 Wall. 82. See brief of plaintiff in error in this case on p. 43; *Town of Genoa v. Woodruff*, 92 U. S. 502; *Mercer Co. v. Hackett*, 1 Wall. 83; *Knox Co. v. Aspinwall*, 24 How. 376; *White v. Vermont etc. R. R.*, 21 How. 575; *McCoy v. Washington County*, 7 Am. Law Reg. 193, 3 Wall. Jr. 381, Fed. Cas. No. 8731; 3 Story on Bills, 336; *Hollingsworth v. Detroit*, 3 McLean, 472, Fed. Cas. No. 6613; *Delafield v. Stevens*, 2 Hill, 177; *Williams v. Sherman*, 7

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Wend. 112; *Amy v. Dubuque*, 98 U. S. 470; *Koshkonong v. Burton*, 104 U. S. 668; *Pana v. Bowler*, 107 U. S. 529, 2 Sup. Ct. Rep. 704; *Holden v. Freedman's etc. Co.*, 100 U. S. 72; *Lawton v. South Carolina R. Co.*, 2 S. C. 248. See Statutes of Minnesota, Wisconsin and Pennsylvania on interest.) Interest on coupons after maturity. The law, as construed by the highest court of the state, at the time of the issue of the bonds enters into and forms a part of the contract, between the corporation and the bondholder. (15 Am. & Eng. Ency. of Law, 1269, note 7; *Alcott v. Supervisors*, 16 Wall. 386; *Douglas v. Pike County*, 101 U. S. 677; *Anderson v. Santa Ana Township*, 116 U. S. 633, 6 Sup. Ct. Rep. 413.) Bonds and coupons like these by universal usage and consent have all the qualities of commercial paper. (*Mercer Co. v. Hackett*, 1 Wall. 83; *Knox Co. v. Aspinwall*, 24 How. 376; *White v. Vermont etc. R. R. Co.*, 21 How. 575; *McCoy v. Washington Co.*, 7 Am. Law Reg. 193, 3 Wall. Jr. 381, Fed. Cas. No. 8731; *City of Aurora v. West*, 7 Wall. 82.)

P. L. Williams and Vic Bierbower, for Respondent.

In this case, although it may be shown by the evidence that the accountants may have made some mistake in their accounting, and even though it may be admitted that the court, upon a proper complaint, might have jurisdiction to correct such error, no relief therefor can be had in this case, because there is no allegation of mistake or allegation of facts showing that any mistake has been made. On the contrary all the allegations of error and wrong are distinctly charged as intentional and fraudulent. (Bliss on Code Pleading, 2d ed., secs. 159-162; Pomeroy on Remedies, 2d ed., secs. 84, 553, 554, 559; *Rome Exchange Bank v. Names*, 5 Abb. Ct. App. Dec. 83; *Hunt v. Daniel*, 6 J. J. Marsh. 399; *McMichael v. Kilmer*, 76 N. Y. 36; *Dudley v. Scranton*, 57 N. Y. 424.) This power of the legislature to create, divide, consolidate at pleasure, or abolish at pleasure, counties and other municipal corporations, carries with it the power on division to provide in the legislative discretion for the division of its properties and liabilities, and such power of the legislature is final and conclusive as to such division, and, if no di-

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vision is provided for, it must be assumed that the legislature concluded that none should be made. (*Windham v. Portland*, 4 Mass. 384; *Hampshire v. Franklin*, 16 Mass. 76.) The legislature itself designated accountants or agents to carry out the legislative will in so far as ascertaining amounts and working out the mere matter of detail. If, then, this agency of the legislature make a mistake or fail to carry out the legislative purpose, it is submitted that within the general principles of the doctrines laid down in preceding cases the mistake is to be corrected by the legislature itself, and this is distinctly declared in the case of *Orange County v. Los Angeles County*, 114 Cal. 390, 46 Pac. 173. (*Los Angeles Co. v. Orange Co.*, 97 Cal. 329, 32 Pac. 316; *Tulare Co. v. Kings Co.*, 117 Cal. 195, 49 Pac. 8; *Sedwick Co. v. Bunker*, 16 Kan. 498.)

QUARLES, J.—By Act of March 18, 1895 (Sess. Laws 1895, pp. 170-174), creating Lincoln county out of territory of Blaine county (formerly Alturas and Logan counties), it is provided that Lincoln county shall pay to Blaine county a portion of the debt of said latter county proportionate to the assessed valuation of the property in Lincoln county taken from Blaine county, and to be ascertained from the assessment-rolls of the former counties of Logan and Alturas for the year 1894. The act provides for the appointment of accountants to ascertain the debt to be apportioned, the per cent of such debt to be ascertained from said assessed valuation of property, and the fixing of the amount to be paid to Blaine county by Lincoln county. Part of section 5 of said act is as follows:

“Said accountants must meet at the town of Hailey on the first Monday of May, 1895, and after taking the usual oath of office, they must proceed to ascertain and determine: “1. The entire amount of taxable property assessed in Alturas and Logan counties for the year 1894, as shown by the assessment-books of said counties; 2. From the assessment-books of Logan county they must ascertain and determine the amount of taxable property assessed within the limits of the county of Lincoln, as hereinbefore described; 3. They must ascertain the amount of cash in the treasuries of Alturas and Logan counties at the date of the passage of this act which was available for the pay-

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ment of the indebtedness of said counties, whether represented by outstanding bonds, warrants or otherwise, and the amount of interest accrued and unpaid at said date; 4. They must then deduct from the amount of the indebtedness, so ascertained and determined, the amount of cash in the treasuries of Alturas and Logan counties at the date of the passage of this act which was available for the payment of the indebtedness of said counties, or any part thereof; 5. They must proceed to ascertain and determine the amount of indebtedness of the counties of Logan and Alturas after deducting the cash available for the payment of the same, or any part thereof, and apportion between the counties of Blaine and Lincoln the remaining indebtedness in the same ratio that the taxable property of the counties of Blaine and Lincoln, so ascertained and determined bears to the entire amount of taxable property within the limits of the county of Blaine as shown by the assessment-books of Alturas and Logan counties for the year 1894."

Section 6 of said act is as follows: "At their regular April session, 1895, the commissioners of each of the counties of Blaine and Lincoln must appoint each a suitable person to examine and appraise the courthouse and jail in the town of Hailey. Said appraisers shall meet at said town of Hailey on the first Monday in May, 1895, and ascertain and determine the present cash value of said courthouse and jail, and the half block of ground upon which they are situated, and immediately report to the accountants herein provided for, the amount at which they have appraised said property, and the accountants must charge the amount so reported to the county of Blaine, and add it to her ratable portion of the indebtedness ascertained, as herein required."

The act then provides that county commissioners "must cause warrants to be issued by the auditor of Lincoln county in favor of Blaine county to the full amount of the ratable proportion of the indebtedness of said Blaine county, as ascertained and determined in the manner hereinbefore described," etc. (Laws 1895, p. 173, sec. 7.) Under said act accountants were appointed, who found and reported the assessed valuation of property in Blaine county to be \$1,419,898, and in Lincoln \$990,977,

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making fifty-eight and nine-tenths per cent of the property in Blaine and forty-one and one-tenth per cent in Lincoln. The accountants found the indebtedness of Blaine county to aggregate \$567,310.74. From this sum they deducted the cash in the treasury of Blaine county, amount of debts due Blaine county from Elmore and Bingham counties, and other items, amounting in all to \$155,929.02, leaving the amount to be apportioned at \$411,381.72, and Lincoln's share of same to be paid to Blaine fixed at \$127,377.89; this result being reached by adding to Blaine's ratable portion of said debt, \$41,700, the value of the Blaine county courthouse as fixed by said appraisers, and by deducting the same amount from Lincoln's ratable portion of said debt. Blaine county refused to accept the report of said accountants as correct, and refused to settle on the basis of said report, and October 18, 1895, commenced this action to have determined and decreed the actual amount to be paid by Lincoln county to Blaine county under the provisions of said act. By agreement of both parties, the cause was heard by Charles S. Kingsley, as referee, who heard and reported the evidence, with his findings thereon, and the trial court thereafter rendered judgment, but rejected the report of said referee in part and adopted it in part. Said referee found as follows: Assessed valuation for 1894: Blaine county, \$1,396,655.73; Lincoln county, \$1,014,032.99. Blaine's percentage, .57936; Lincoln's percentage, .42064. The referee then found the amount of indebtedness owing by Blaine, including interest thereon to March 18, 1895, to be \$603,490.45. From this amount the referee deducted \$36,625.02, the amount of cash that he found to be in the treasury of Blaine (formerly Alturas and Logan) county, applicable to the payment of said indebtedness, and the further sum of \$31,000, the value of Blaine county's courthouse, as found by him; leaving the amount to be apportioned between the said counties at \$535,865.43; placing Blaine's proportion at \$310,459, and Lincoln's at \$225,406.43.

The district court held—correctly, we think—that the accountants were not authorized to deduct from the indebtedness of Blaine county prior to making the apportionment the sums due from Elmore and Bingham counties. The district court

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corrected the report of the accountants by deducting from the aggregate indebtedness of Blaine county, as cash in the county treasury, \$37,279.34, instead of the item, "Blaine county resources, \$155,929.02," but held the report of said accountants in all other respects binding upon both counties. The report of said accountants is attacked by the complaint as being incorrect, false and fraudulent. The defendant contended that the court had no jurisdiction, for the reason that the legislature is authorized by the constitution to divide counties and apportion the indebtedness, and that to carry out the intention of such legislative enactment the legislature could employ the agency used in this case. This contention is correct, and so regarded by the district court. But the district court held that the "stating of the account between the two counties" necessarily required the exercise of judgment on the part of the accountants, whose acts could not be attacked in a proceeding of this kind, which conclusion was not correct. Having divided one county, and created a new one out of part of the old one, and provided for the apportionment of the outstanding indebtedness of the old county between the two upon a given basis, it was proper for the legislature to provide agencies to carry its will into effect. But the accountants provided were not clothed with either legislative or judicial functions. The acts required of them were purely clerical. They were required to ascertain the assessed valuation of the property in the old county for the year of 1894, as shown by the assessment-rolls, and to ascertain the per cent of same in each of the counties litigant. This was mere matter of computation. Then said accountants were to ascertain the amount of the outstanding indebtedness of Blaine county, deduct therefrom the cash in the treasury of the former counties of Alturas and Logan (both then merged into Blaine) applicable to the payment of said indebtedness, and then to apportion the balance of said indebtedness between Blaine and Lincoln counties in the proportion that the assessed valuation of property for 1894 in one county bore to that in the other. Said accountants were then to add to Blaine county's ratable portion of said debt, so ascertained, the amount at which the appraisers had valued the Blaine county courthouse. All of said acts were

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clerical, and said acts were directed to be done in the above-named order. The accountants were not authorized to deduct anything from the indebtedness to be apportioned, except the cash in the treasury applicable to the payment of same. The action of said accountants was not final. They failed to carry out the expressed will of the legislature, and did not do those things which the legislature required them to do. They did not find the true valuation of the property in the two counties. They did not find the true ratio existing between the assessed valuation of the property in the two counties. They apportioned the debt on the wrong basis, and then added to the amount apportioned to Blaine the valuation \$41,700, found by the appraisers as the value of the Blaine county courthouse, and deducted the same amount from the amount apportioned to Lincoln county. The result of their action was to reduce the amount which Lincoln county was to pay to Blaine, something over \$100,000. Whether the said accountants intended to commit a fraud upon the rights of Blaine county, or their action was the result of mistake or inadvertence, is immaterial, as the result defrauded Blaine county, and, if not actual fraud, is legal fraud. Said accountants made numerous errors, all of them against one and in favor of the other county, and under such circumstances perhaps actual fraud should be presumed.

The position of the respondent that the court has no jurisdiction of the subject matter of this action, and no power to grant relief to the appellant, the action of the accountants being final, is not tenable. The legislature fixed the rights of both parties. It would be a travesty on law and the administration of justice to say that under the circumstances of this case the expressed will of the legislature could be defeated by said accountants, and that the courts are powerless to grant relief to the injured party. (See *Blaine Co. v. Smith*, 5 Idaho, 255, 48 Pac. 286.)

There is nothing in the argument that the appellant should resort to the legislature for relief. The legislature has acted in the matter. It has fixed the rights of both parties, and provided the standard by which Lincoln county's liability to Blaine county is to be determined. It was the duty of said accountants to do those things, and only those things, required by said

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act of the legislature. They did not obey the mandates of the legislature, and the courts have jurisdiction to grant relief, and to carry out the expressed will of the legislature under the circumstances of this case. It will be seen by a careful reading of the said act that after the apportionment of the debt between the two counties the value of the Blaine county courthouse was to be added to the amount of the indebtedness apportioned to Blaine county. But, as it is not provided in said act that Blaine county shall pay the value of said courthouse to any person, natural or artificial, or that the value thereof should be deducted from the amount to be paid by Lincoln county to Blaine county, the fixing of a valuation on the said courthouse would seem to be an idle act, and the amount of such valuation immaterial. It would, perhaps, have been equitable to have deducted the value of said courthouse from the aggregate indebtedness before apportionment, but the legislature did not so provide, and neither the said accountants nor the court can add to or take from the provisions of the legislative act under consideration.

We have carefully considered the evidence in this case, and think that the findings of the said referee as to the assessed valuation of property, the *pro rata* share of each of the counties litigant, the amount of the outstanding indebtedness of Blaine county, and the amount of cash in the county treasury applicable to the payment of said indebtedness fully supported by said evidence. The said referee erroneously added the value of the Blaine county courthouse to the cash in the treasury applicable to the payment of Blaine's indebtedness; and he should not, for the reasons hereinbefore given, have deducted the value of said courthouse from such indebtedness before apportioning it between the two counties. In determining the amount of the outstanding indebtedness of Blaine county the referee computed simple interest on same, but failed to compute or allow interest on interest coupons past due. The action of the referee in this respect was correct. Chapter 6, title 13 of the Civil Code, under which the bonds in question were issued, provides that such bonds shall be paid "at the office of the county treasurer, or at such bank in the city of New York as may be designated

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by the board of county commissioners, at the option of the holder thereof." There is no allegation or proof in the record before us that said bonds and their coupons were payable in New York, hence we are compelled to hold that said bonds and coupons are Idaho contracts, and to be performed in Idaho. Section 1265 of the Revised Statutes, prohibits compound interest. To have authorized the allowance of compound interest, or interest on the interest coupons, it should have been alleged and shown that said interest coupons were, by the contract, payable in New York, and that by the laws of New York interest was allowable on them. Such conditions were suggested by counsel for appellant in their argument, but such suggestions were not proper, and cannot be considered. In the absence of allegation and proof to the contrary, the presumption is that the said bonds and coupons are payable and to be paid where made. Compound interest not being allowable in Idaho, neither the said accountants nor the court can compute interest on said coupons in estimating the amount of indebtedness of Blaine county to be apportioned. The outstanding indebtedness of Blaine county at the time the same should have been apportioned between the counties litigant was the sum of \$603,490.45. The cash in the county treasuries applicable to the payment of said indebtedness was the sum of \$36,625.02. Balance to be apportioned between the two counties, \$566,865.43. Lincoln's *pro rata* thereof (.42064 per cent) is \$238,446.27, for which amount Blaine county should have had judgment. The judgment appealed from is reversed, and the cause is remanded to the district court, with instructions to enter judgment in favor of the plaintiff, Blaine county, and against the defendant, Lincoln county, for the sum of \$238,446.27, to be paid by the warrants of said Lincoln county, issued in the manner and amounts as provided in section 7 of said act of March 18, 1895, all of such warrants drawing interest from March 18, 1895, until paid; and costs of suit incurred by plaintiff in the action. Costs of this appeal awarded to the appellant.

Sullivan, C. J., and Huston, J., concur.

Argument for Appellant.

(February 26, 1898.)

STRODE v. STRODE.

[52 Pac. 161.]

DIVORCE—SERVICE BY PUBLICATION.—All of the requirements of the statute authorizing service of summons by publication must be complied with to give the court jurisdiction.

SAME—WHAT NECESSARY TO GIVE JURISDICTION.—When the record fails to show that a copy of the summons was sent to the address of the defendant, when the order directs that to be done, service of the publication is not complete, and does not give the court jurisdiction.

SAME—PROOF OF SERVICE.—Unless affidavits are filed showing that all of the requirements of the statute authorizing service by publication have been complied with, the court has no jurisdiction to enter judgment and decree.

(Syllabus by the court.)

APPEAL from District Court, Ada County.

Hawley & Puckett, for Appellant.

Affidavit and order for publication are not part of the judgment-roll. (Rev. Stats., sec. 4456; *McCanley v. Folton*, 44 Cal. 355; *In re Newman*, 75 Cal. 215, 7 Am. St. Rep. 146, 16 Pac. 887; *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742, and note; *People v. Temple*, 103 Cal. 447, 37 Pac. 414.) The affidavit to obtain service is not a jurisdictional fact. (*Dore v. Dougherty*, 72 Cal. 232, 1 Am. St. Rep. 48, 13 Pac. 621; *Newcombe v. Newcombe*, 13 Bush, 594; *Thomas v. Mahone*, 9 Bush, 125.) It will be presumed that evidence to establish the sufficiency of the service has been introduced. (*Blasdel v. Kean*, 8 Nev. 308; *Gilpen v. Page*, 1 Saw. 325, Fed. Cas. No. 5205.) The existence of any jurisdictional fact, not affirmed upon the record, will, upon a collateral attack, be presumed. (Freeman on Judgments, 124, 125; *Wiggin v. Superior Court*, 68 Cal. 400, 9 Pac. 646.) Where the record is silent as to a question of jurisdiction the judgment of the court cannot be collaterally impeached for any alleged want of jurisdiction over the parties to the decree. (*Lawler v. White*, 27 Tex. 353; *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742, and note; *Cole v. Butler*, 23 Mo. 401;

Argument for Respondent.

1 Black on Judgments, 263.) Whether summons was regularly issued or not is not a jurisdictional fact. (*Dore v. Dougherty*, 72 Cal. 232, 1 Am. St. Rep. 48, 13 Pac. 621; *Dunham v. Wilfring*, 69 Mo. 355; *Casey v. People*, 165 Ill. 49, 46 N. E. 7; *Newman v. Bullock*, 23 Colo. 217, 47 Pac. 379.)

W. E. Borah, for Respondent.

Whenever it appears, either from the records or by evidence outside, that the defendants were, at the time of the alleged service upon them, beyond the reach of the process of the court, the presumption ceases and the burden of establishing the jurisdiction over them is thrown upon the party who invokes the benefit of the judgment. So, too, the presumption ceases when the proceeding was not in accordance with the course of the common law. (*Gray v. Larimore*, 4 Saw. 639, Fed. Cas. No. 5721; Freeman on Judgments, 3d ed., 123, 127; Black on Judgments, sec. 279; *Galpin v. Page*, 18 Wall. 959.) The fact that the statute has been strictly followed must be proved no presumption of jurisdiction being indulged in. (Stewart on Jurisdiction, sec. 234; *O'Dell v. Campbell*, 9 Or. 298; *Victor v. Davis*, 11 Or. 447, 5 Pac. 750; *Pennoyer v. Kneff*, 95 U. S. 743; *Cofield v. McClelland*, 16 Wall. 331; *Commonwealth v. Blood*, 97 Mass. 538.) Statutes requiring service by publication are in derogation of the common law and must be strictly construed. (*Forbes v. Hyde*, 31 Cal. 35; *People v. Huber*, 20 Cal. 81; *Baley v. Seaman*, 30 Cal. 618; *Scorpion v. Marsano*, 10 Nev. 380; *O'Dell v. Campbell*, 9 Or. 298; *Gray v. Larimore*, 4 Saw. 639, Fed. Cas. No. 5721; *Tunis v. Withrow*, 10 Iowa, 305, 77 Am. Dec. 117; *Vizzard v. Taylor*, 97 Ind. 93; *Boylard v. Boyland*, 18 Ill. 551; Black on Judgments, sec. 232; *Earl v. McVeigh*, 95 U. S. 503; *Settlemier v. Sullivan*, 97 U. S. 444; *Cheely v. Clayton*, 110 U. S. 701, 4 Sup. Ct. Rep. 328; *Applegate v. Lexington*, 117 U. S. 255, 6 Sup. Ct. Rep. 742.) The district court has no authority to render judgment by default against a defendant served with notice by publication when the record does not affirmatively show that the statute has been complied with. (*McCraney v. Childs*, 11 Iowa, 54; *Tooley v. Comely*, 9 Iowa, 240; *McGahen v. Carr*, 6 Iowa, 331, 71 Am.

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Dec. 421, and note; *O'Rear v. Lazarus*, 8 Colo. 608, 9 Pac. 621.) No service or proof of service by mail. This renders the judgment wholly void. (*Roberts v. Roberts*, 3 Colo. App. 6, 31 Pac. 941; *O'Rear v. Lazarus*, 8 Colo. 608, 9 Pac. 621; *Schart v. Schart*, 116 Cal. 91, 47 Pac. 927.)

SULLIVAN, C. J.—This is an action for divorce on the ground of cruelty. The defendant answered the complaint denying the allegation of cruelty, and by cross-complaint asked that the marriage between himself and the plaintiff be annulled, for the reason that the plaintiff had a husband, from whom she had not been divorced, living at the time of the intermarriage of plaintiff and defendant. The trial court found that the charge of cruelty was not supported by the evidence, and also found that the allegations of the cross-complaint were true, and entered judgment and decree annulling the marriage as prayed for in the cross-complaint. A motion for a new trial was made by the plaintiff (appellant here), and overruled by the court. This appeal is from said order denying a new trial and from the judgment.

Numerous errors are specified, but, in our view of the case, it is only necessary to review those findings of fact on which the conclusion of law is based that the decree of divorce entered in the case of Deeds against Deeds was a nullity. The facts are substantially as follows: On the fourth day of July, 1880, the plaintiff married one Rufus M. Deeds at the town of Blanchard, in the state of Iowa. The plaintiff and her said husband, Deeds, came to Idaho in 1881; resided in Idaho until 1885; then went to Oregon, and returned to Idaho in 1886; and in 1888 returned to Oregon, and resided at Eugene, or near there. The plaintiff and her said husband separated in the spring of 1890. Plaintiff then went to the city of Portland, and engaged in the real estate business. On the fifth day of January, 1892, she returned to Boise City, Idaho; and on the second day of February, 1892, began a suit in the district court of Ada county to obtain a divorce from her said husband, Deeds. In the complaint she alleged, in substance, that she had been a resident of the state of Idaho since 1881; the marriage of herself and the defendant, Rufus M. Deeds; extreme cruelty as the grounds for divorce.

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A summons was duly issued on said second day of February, and returned and filed on the fourth day of said month. The return thereon recited that the defendant, Rufus M. Deeds, could not be found in Ada county. Thereupon service was attempted to be made by publication. The affidavit for service of the summons by publication, made by the plaintiff in that case, is as follows:

"State of Idaho. }
County of Ada. } ss.

"Flora A. Deeds, being first duly sworn, on her oath deposes and says that she is the plaintiff in the above-entitled action; that the complaint in said action was filed February 2, 1892, with the clerk of said court, and summons was thereupon issued; that said action is brought to dissolve the bonds of matrimony now existing between plaintiff and defendant; that the cause of action is fully set forth in plaintiff's verified complaint on file herein; that said defendant is now out of this state, and cannot, after due diligence, be found therein; that this affiant has inquired of the friends and acquaintances of the defendant, to wit, Mrs. A. Jane Williams, Mr. Frank C. Bond, David Spiegel and H. P. Nelson, as to the whereabouts of the defendant, and none of them know his present place of residence, unless it be Portland, Oregon; that when he (the defendant) left Boise valley he stated to his said friends that he was going to Portland, Oregon; that he went there, but as to whether he is there at the present time they have no knowledge, but that, if he had returned to this state, they, his friends, would have known of his return. This affiant therefore says that the defendant is not in this state, and that personal service of summons cannot be had on said defendant, Rufus M. Deeds, within this state, and prays for an order that service of the summons may be made by publication.

FLORA A. DEEDS.

"Subscribed and sworn to before me this 18th day of February, A. D. 1892.

"CHAS. A. CLARK,
"Notary Public."

Upon reading and filing said affidavit, Honorable E. Nugent, judge of the district court of said Ada county, made an order

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directing that service of said summons be made by publication of the summons in the "Idaho Democrat," a newspaper published in Boise City, Idaho, and also directed that a copy of the summons and complaint in said suit be deposited in the post-office at Boise City, Idaho, postage prepaid, and addressed to said defendant, Rufus M. Deeds, at Portland, Oregon. Said order was made on the nineteenth day of February, 1892. On the second day of December, 1892, said court made and filed the following judgment and decree of divorce:

"Be it remembered that on the second day of December, 1892, the same being the fifth judicial day of the third judicial court of the state of Idaho in and for Ada county, November term, the Honorable Edward Nugent, sole judge, presiding, this cause of action coming on for hearing, the plaintiff appearing by her attorney, D. T. Miller, and though the defendant having been duly served with due, legal and timely service with the original summons issued out of said court, of the pendency of this action, appeared not, and it was therefore ordered and adjudged that defendant be declared in default for not answering, which was duly entered. And be it further remembered that on said day, this cause of action coming on for further and final hearing on the complaint filed therein, and the proof thereof and the court having been first fully advised of the allegations in plaintiff's complaint and hearing the testimony in support thereof, and all and singular the law and the premises, being by the court here understood and fully considered, finds for the plaintiff and against the defendant. Wherefore it is here ordered, adjudged and decreed, and this does order, judge and decree, that the marriage between the said plaintiff, Flora A. Deeds, and the defendant, Rufus M. Deeds, be dissolved, and the same is hereby dissolved, and the plaintiff, Flora A. Deeds, is freed and absolutely released from the bonds of matrimony, and all obligations thereunder, and restored to all the rights and privileges of an unmarried woman; and it is further ordered, adjudged and decreed that the custody and control of the minor child of said marriage, Flora L. Deeds, age nine (9) years, be, and the same is hereby, awarded to the plaintiff, Flora A. Deeds. Done in open court this second day of December, 1892.

"E. NUGENT,
"Judge."

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The decree recites that the defendant, Deeds, had been duly served with the original summons, and appeared not, and thereupon defendant was adjudged to be in default for not answering, and default was entered against him, and, after hearing the evidence offered by the plaintiff, a decree of divorce was entered in her favor. The record shows that the original summons was placed in the hands of the sheriff of Ada county for service on the third day of February, 1892, and returned on the fourth day of February, 1892, with the indorsement of the sheriff thereon stating that, after due and diligent search, he was unable to find the defendant therein named within Ada county. Thereafter, on the nineteenth day of February, the judge made the order directing that service of the summons be made by publication. The record contains the affidavit of the publisher of the newspaper named in said order, wherein he stated that the summons was published in said newspaper at least once a week for one month, commencing on the twenty-first day of February, and ending on the twenty-third day of March, 1892. The record fails to show that a copy of the summons and complaint was sent to the defendant, Deeds, as required by said order of publication of summons; also fails to show that an *alias* summons was issued after the original summons had been returned as aforesaid.

It is admitted by counsel for the appellant that said affidavit on which the order for service of summons by publication was made, was false in some of its allegations; that it was false as to the allegations or statements as to the residence and post-office address of her said husband, Deeds; but they contend that said false statements were unintentional, and did not result in depriving Deeds of the knowledge of the fact that said divorce suit was pending, and that Deeds had actual notice of the pendency of said action.

Under the provisions of section 2469 of the Revised Statutes of Idaho, a suitor for a divorce must be an actual resident of the state for a period of at least six months next preceding the commencement of the action therefor. The evidence shows that the appellant resided in the state of Oregon from 1888 to the fifth day of January, 1892, when she returned to this state, and

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commenced said suit against her said husband, Rufus M. Deeds, on the second day of February, 1892. After residing in Oregon for four years she returned to this state, and had resided here less than thirty days at the time of the commencement of said divorce suit. The evidence shows that she knew that her said husband's postoffice address was Eugene, Oregon, and that she deposed, in said affidavit for publication of summons, that she had inquired of certain persons, naming them, as to the whereabouts of her said husband, and that none of them knew his then place of residence, unless it was at the city of Portland, state of Oregon. The proof of service of summons fails to show that a copy of the summons and complaint were mailed to the defendant, as required by said order.

It is contended by respondent that said decree of divorce is void and a nullity, for the reasons: 1. That the appellant had not been a resident of this state more than thirty days prior to the commencement of said suit, whereas by the provisions of said section she was prohibited from bringing said suit until she had resided in the state six months. 2. That she perpetrated a fraud on the court by making a false affidavit in procuring an order for the service of summons by publication. 3. That after the return of the original summons, showing that the defendant could not be found in said Ada county, no *alias* summons was issued (the publication of summons having been made from a copy), and that no live process was in existence after the return of the original summons, and for those reasons the court never had jurisdiction of the said defendant, Rufus M. Deeds, and had no jurisdiction to enter said judgment and decree for divorce.

We think said contentions of respondent are sustained by the record. The defendant Deeds did not voluntarily appear in said case, and the attempted service of summons by publication utterly failed to confer jurisdiction on the court. Under subdivision 1, section 4456 of the Revised Statutes of Idaho, the judgment-roll, in cases like the one at bar, consists of the summons, with the affidavit or proof of service, and the complaint, with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment. In the case at bar the judgment-roll in the said case of

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Deeds against Deeds was introduced in evidence, and it contains no proof of the service of summons by publication or otherwise, and the evidence shows, as a matter of fact, no service by publication was made. That being true, the court had no jurisdiction to enter judgment and decree in said case of Deeds against Deeds, and the decree therein was absolutely void for want of jurisdiction. The mere fact that a defendant has knowledge of a suit pending against him is not sufficient to give the court jurisdiction. Notice, as required by law, must be given, or the voluntary appearance of the defendant shown, in order to give jurisdiction. In *Roberts v. Roberts*, 3 Colo. App. 6, 31 Pac. 941, it is said: "All the steps which the statute prescribes must not only be followed, but proven, to confer jurisdiction on the court over the absent defendant." In *O'Rear v. Lazarus*, 8 Colo. 608, 9 Pac. 621, the court says: "The rule in such cases [service of summons by publication] seems to be that the record must show essentially all the jurisdictional facts. . . . It follows, therefore, that the record in this case should have affirmatively shown a compliance with the statutory provisions relating to forwarding the process by mail. This it failed to do, and the omission is fatal to the jurisdiction of the court below." (See, also, *State v. Superior Court*, 6 Wash. 352, 33 Pac. 827.) In *Schart v. Schart*, 116 Cal. 91, 47 Pac. 927, it was held that service by publication on nonresidents, whose address is known, is not complete until copies of the summons and complaint are mailed to them, as required by the order of publication. In *Lewis v. Lewis*, 15 Kan. 181, Justice Brewer, speaking for the court, and commenting on that section of the Kansas statutes authorizing service of summons by publication, and referring to each act required to be done by the provisions of said section, says: "Now, this is a part of the service; without it no decree can be properly entered. It is a precaution ordered by the legislature to guard against the danger of decreeing a divorce without the knowledge and presence of both parties. It may be very inadequate, but it is worth something. It is a step in the right direction. But, whether adequate or not, it is the legislative direction, and as such, may not be disregarded." Nothing short of a substantial compliance with the prerequi-

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sites of the statute authorizing service of summons by publication will give jurisdiction. The judgment-roll should show on its face that each and every act required by law had been substantially complied with, or the judgment must be treated as void. (*Trust Co. v. McGregor*, 5 Idaho, 510, 51 Pac. 104.) A court is not authorized to enter judgment and decree, in cases where service of summons is made by publication, until proof of a substantial compliance of the law as to publication of summons and mailing of summons and complaint is made and filed with the clerk of the court. (In *Crouch v. Crouch*, 30 Wis. 667, a case in some particulars very much like the one at bar, the court said: "But the order and judgment are void for another reason. It is a verity in this case that, when the plaintiff made the affidavit upon which the order of publication was granted, she knew the residence or stopping place of the defendant; she also knew where he was when she testified before the referee. Yet she studiously concealed these facts from the commissioner and the court, for the evident purpose of obtaining a judgment of divorce without the knowledge of the defendant." Upon a careful examination of the evidence, we are of the opinion that the plaintiff would not have been entitled to a divorce had no defense been made on the ground of the nullity of the decree of divorce between plaintiff and her husband, Deeds. Under the provisions of section 2471 of the Revised Statutes, no divorce can be granted upon the uncorroborated testimony of the parties. The evidence of the plaintiff on the allegation of cruelty is uncorroborated, and in fact contradicted by several witnesses. The judgment of the court below is affirmed. The respondent is ordered to pay the costs of this appeal.

Huston and Quarles, JJ., concur.

Argument for Appellant.

(May 6, 1898.)

ANDERSON v. SHOSHONE COUNTY.

[53 Pac. 105.]

COUNTY COMMISSIONERS—EMPLOYING COUNSEL FOR COUNTY.—On an appeal from the action of a board of county commissioners in employing counsel to represent the county in litigation instituted on behalf of the county, no abuse of discretion by the board appearing, their action will not be disturbed.

(Syllabus by the court.)

APPEAL from District Court, Shoshone County.

W. B. Heyburn, E. M. Heyburn, and L. A. Doherty, for Appellant.

The sole question to be decided here is whether or not the board of county commissioners of Shoshone county had the authority to make the order appealed from. The right of a county to employ counsel is expressly conferred by the constitution and laws of Idaho. Article 18, section 6, of the constitution, reads, *inter alia*, as follows: "The county commissioners may employ counsel when necessary." Subdivision 13 of section 1759 of the Revised Statutes of Idaho (1887), defining the duties of county commissioners, gives them power "to direct and control the prosecution and defense of all suits to which the county is a party in interest, and employ counsel to conduct the same, with or without the district attorney as they may direct. (*Meller v. Board of Commrs.*, 4 Idaho, 44, 35 Pac. 712; *Hampton v. Board of Commrs.*, 4 Idaho, 646, 43 Pac. 324; *Ravenscraft v. Board of Commrs.*, 5 Idaho, 178, 47 Pac. 942.) Under provisions almost identical with our own, this same question, and even the same phases thereof, have been decided by the supreme court of California in exactly the same way as in this court. (*Smith v. Mayor etc.*, 13 Cal. 531; *Hornblower v. Duden*, 35 Cal. 664; *Scollay v. Butte Co.*, 67 Cal. 249, 7 Pac. 661; *Lassen Co. v. Shinn*, 88 Cal. 510, 26 Pac. 365; *Modoc Co. v. Spencer*, 103 Cal. 498, 37 Pac. 483; *Hunt v. Broderick*, 104 Cal. 313, 37 Pac. 1040; *Power v. May*, 114 Cal. 207, 46 Pac. 6; *Merriam v. Barnum*, 116 Cal. 619, 48 Pac. 727; *Lamberson v. Jefferds*, 118 Cal. 363, 50 Pac. 403.)

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W. W. Woods, for Respondent, cites no authorities on the point decided not cited by attorneys for appellant.

HUSTON, J.—This is an appeal from a judgment of the district court setting aside and declaring void certain orders of the board of commissioners of Shoshone county, which entered into a contract with W. B. Heyburn, Esq., to perform certain legal services for said county, and provided for his compensation therefor. Appeal was taken by the respondent to the district court from the action of the board, and that court set aside and declared void the orders so made by the board, and from such action and judgment of the district court this appeal is taken. It is not contended by respondent that no necessity for the employment of counsel existed, nor that the same is not made apparent by the records of the board. Neither is it contended that the contract made was an improvident one, nor that the compensation stipulated to be paid was excessive or unreasonable for the services required to be performed. The sole contention of respondent would appear to be that the board, in entering into the contract with Mr. Heyburn, entirely ignored the district attorney of the county, who, by the provisions of the statute (Laws 1890-91, p. 47), "is to prosecute or defend all actions, applications or motions, civil or criminal, in the courts of his district, in which the people of the state, or any of the counties of his district are interested or a party." It seems to us this objection should more properly come from the district attorney himself, but that officer does not seem to have considered himself especially aggrieved by the action of the board; at least, he has made no moan apparent in the record. The act defining the duties of the district attorney (Laws 1890-91, p. 47) neither modifies nor in the least impairs the force of subdivision 13 of section 1759 of the Revised Statutes, defining the powers and prescribing the duties of boards of commissioners, which is as follows: "To direct and control the prosecution and defense of all suits to which the county is a party in interest, and employ counsel to conduct the same, with or without the district attorney, as they may direct." There cannot, we think, be any question but that, under the constitution and laws of Idaho, boards of commissioners of the several counties are empowered to em-

Points decided.

ploy counsel in all litigation in which their county is a party in interest; and in making such employment it is not obligatory upon them to consult the district attorney, although it is eminently proper for them to do so. Still, that they may not have done so is no ground for a reversal of their action. We think this case comes clearly within the rule laid down by this court in *Ravenscraft v. Board*, 5 Idaho, 178, 47 Pac. 942.

A motion to strike out a portion of the transcript in this case was submitted at the hearing. The transcript contains certain papers, which, it is objected, do not appear by the record to have been used on the hearing in the district court. Said papers do not appear in the bill of exceptions, which was settled on March 1, 1898, nor were they filed until March 24, 1898. We do not think these papers are properly in the transcript, and the motion to strike them out is allowed. The judgment of the district court is reversed, and the cause remanded, with instructions to the district court to affirm the order of the board of commissioners. Costs to the appellant, less the printing of eighteen pages of the transcript.

Sullivan, C. J., and Quarles, J., concur.

(May 6, 1898.)

STATE EX REL. MISSOULA MERCANTILE COMPANY v.
WHELAN, PROBATE JUDGE.

[53 Pac. 2.]

MANDAMUS—ORDER TO SELL REAL ESTATE—APPEALABLE ORDER.—

Under the provisions of subdivision 5, section 4831, of the Revised Statutes, an order denying the issuance of an order to show cause why the real estate of a decedent should not be sold to pay claims against his estate is an appealable order. A plain, speedy and adequate remedy by appeal having been thus provided, a writ of mandata will not issue to compel the issuance of such order.

(Syllabus by the court.)

Argument for Respondent.

APPEAL from District Court, Shoshone County.

H. F. Samuels, for Appellant.

The court erred in granting the peremptory writ of mandate. (Merrill on Mandamus, sec. 67, p. 77.) It is contrary to the policy of the law that *mandamus* should issue, where its sole purpose and effect is to release the party seeking it from the consequence of his own mistake and omission. (14 Am. & Eng. Ency. of Law, 105; *Klokke v. Stanley*, 109 Ill. 192; 3 Estee's Pleading and Practice, Boone's ed., sec. 5416, and note; *State v. Railroad Co.*, 42 La. Ann. 138, 7 South. 226; *State v. Young*, 38 La. Ann. 923; *Blair v. Mayre*, 80 Va. 485.) *Mandamus* will not lie to compel a public officer to do an act not clearly commanded by law. (14 Am. & Eng. Ency. of Law, 102, and note.) The writ of mandate will not lie if the right of the party applying therefor is not clear. (3 Estee's Pleading and Practice, Boone's ed., sec. 5422; *People v. Spruance*, 8 Colo. 307, 6 Pac. 831.) The order of the probate court denying the sale of the said real estate is an appealable order (Idaho Rev. Stats., sec. 4381, subd. 5), and if respondent was dissatisfied with the ruling of the court they should have appealed, for writ of *mandamus* should not be issued in any case in which there is a plain, speedy and adequate remedy in the ordinary course of law (Idaho Rev. Stats., sec. 4978) and an appeal is a plain, speedy, and adequate remedy. (*Clark v. Minnis*, 50 Cal. 510.) *Mandamus* cannot direct what judgment shall be rendered, and when a decision has been reached in a matter involving discretion a writ of *mandamus* will not lie to review or correct it, no matter how erroneous it may be. (*Pyke v. Steunenbergh*, 5 Idaho, 614, 51 Pac. 615; Merrill on Mandamus, sec. 32.)

W. W. Woods, for Respondent.

The writ of *mandamus* is used to quicken the negligence and obviate their denial of justice by inferior courts. When a duty is imposed by law upon a court a *mandamus* from a higher court is the proper means to compel the discharge of such duty. When such duty is so plain in point of law and so clear in matter of fact that no element of discretion is left as to the precise mode of its performance such duty is ministerial, and a

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writ of *mandamus* to compel the performance of such duty will specify the exact mode of performance. (Merrill on *Mandamus*, sec. 186; High on Extraordinary Legal Remedies, 230.) When a court for any cause improperly refuses to proceed in a cause, *mandamus* lies to compel action. (Merrill on *Mandamus*, sec. 204; High on Extraordinary Legal Remedies, secs. 152, 171.)

SULLIVAN, C. J.—This is an appeal from an order granting a writ of mandate to compel the defendant, the probate judge of Shoshone county (who is appellant), to issue an *alias* order to show cause why the real estate of Edward Paquin's estate should not be sold. It appears from the record that on December 17, 1897, the plaintiff, the Missoula Mercantile Company, filed its petition for the sale of said real estate, and at the same time presented to the appellant, for his signature, an order to show cause in said matter, in which order the date of such hearing was fixed for the eighteenth day of January, 1898. Thereupon the appellant requested the respondent to change said date to the twenty-fourth day of January, 1898. Respondent objected to any change being made, and thereupon the appellant signed said order. On the eighteenth day of January, 1898, the public administrator, who was and is administrator of said estate, filed objections to said petition. Counsel for respondent appeared, and argued the question thus submitted on its merits. It appears that the administrator contended that due and sufficient notice had not been given of such hearing, and that the proceedings in said matter were not regular. It was shown that said order to show cause why said real estate should not be sold as prayed for in said petition was published the first time in the "Wallace Press," a newspaper published at Wallace, in said Shoshone county, on the twenty-second day of December, 1897, and was published in each weekly issue of said newspaper "for the full period of thirty days," the last publication thereof being in the issue dated the twelfth day of January, 1898. As a matter of fact, but three issues of the paper were published. After hearing argument of respective counsel, the court refused to make an order for the sale of said real estate, on the ground that notice thereof had not been pub-

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lished the period required by law. Thereupon counsel for respondent corporation made a motion for the issuance of an *alias* order to show cause why said real estate should not be sold as prayed for in the petition aforesaid. Said motion was denied on the ground "that an *alias* order to show cause, based on said petition, would be contrary to law, and have a tendency to cloud the title to the property sold under such order, and that such property would realize a better figure if a new petition were filed, and notice given accordingly." Thereupon application was made to the district court for a writ of mandate to compel the appellant to issue such order. The petition therefor and answer thereto set forth substantially the facts as above stated. The matter was heard by the court, and a peremptory writ of mandate issued as prayed for, requiring the appellant to make an *alias* order to show cause why said real estate should not be sold as prayed for in said petition. This appeal is from the order or judgment directing the issuance of said peremptory writ of mandate.

Section 4977 of the Revised Statutes provides, *inter alia*, that the writ of mandate may be issued to any inferior tribunal to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station. Section 4978 provides, among other things, that the writ must be issued in all cases where there is no plain, speedy, and adequate remedy in the ordinary course of law. Upon a proper showing, it is the duty of the probate court to issue an order to show cause why the real estate of a decedent should not be sold; and the writ of mandate should issue to compel it to be done, in case of refusal, provided there is no plain, speedy, or adequate remedy at law. Subdivision 5 of section 4831 of the Revised Statutes, provides that an appeal may be taken "against or in favor of directing the partition, sale, or conveyance of real property." An order was made denying the sale of said real estate as prayed for in the petition, on the ground that sufficient notice of the hearing had not been given. Under the subdivision of said section 4831, above quoted, said order was appealable, and the general rule is that, where an appeal is given, a plain, speedy, and adequate remedy is provided; and we can see no reason

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why the general rule should not apply in this case. The judgment of the lower court is reversed, and costs of this appeal awarded to appellant.

Huston, and Quarles, JJ., concur.

(May 6, 1898.)

IN RE JOSEPH H. MORAGNE.

[53 Pac. 3.]

HABEAS CORPUS—HOLDING PARTY TO BAIL AFTER CHARGE IS IGNORED BY GRAND JURY.—It is error to hold a party to bail to answer a charge of felony after the charge has been fully and fairly investigated by a grand jury which ignored the charge, in the absence of a showing of improper conduct on the part of the grand jury, and it is not made to appear that other evidence than that considered by the first grand jury, which tends to prove the guilt of the accused, can, with reasonable diligence, be presented to an other grand jury to be impaneled at the next term of the district court.

RESUBMISSION OF CRIMINAL CHARGE TO GRAND JURY.—To authorize the resubmission of a charge which has been ignored by one grand jury to another grand jury to be thereafter impaneled, good cause for so doing must be shown.

(Syllabus by the court.)

Original proceeding for writ of *habeas corpus*.

James W. Reid, for Petitioner.

The facts being fully set forth in the opinion, the following authorities are cited: Idaho Rev. Stats., secs. 7666, 7667, 8212, 8213; 4 Deering's Code, secs. 940, 942, 1382, 1383; Idaho Const., art. 1, sec. 8; *Ex parte Bull*, 42 Cal. 196; *Ex parte Clark*, 54 Cal. 412; 1 Bishop's New Criminal Procedure, sec. 870.

Attorney General R. E. McFarland, for the State.

No brief filed.

QUARLES, J.—The petitioner, after notice to the attorney general, made application for a writ of *habeas corpus*. The

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matter was fully argued by James W. Reid, for the petitioner, and by the attorney general in opposition. After duly considering the matter, the writ was ordered issued, which was done. To the writ the sheriff has made his return. From the petition and exhibits thereto attached, and the return to the writ, it appears that the petitioner was arrested upon a warrant which issued upon a complaint verified by one L. L. Strang, charging petitioner with the crime of murder, committed in Nez Perces county, by taking the life of one D. A. Kippen; that the petitioner was taken before P. E. Stookey, probate judge of Nez Perces county, who, after a preliminary examination, and on February 14, 1898, held the petitioner to answer the said charge to the district court, and committed the petitioner to the custody of Thomas D. Barton, sheriff of Nez Perces county; that thereafter, and at the regular March term of the district court of the second judicial district, sitting in and for Nez Perces county, the said charge was fully examined by a grand jury, duly impaneled, which grand jury had before it the depositions taken at the preliminary examination, the testimony taken before the coroner's inquest, and numerous witnesses, which grand jury ignored the said charge, and endorsed on said depositions, "Not a true bill." The petitioner thereupon, through his attorney, moved his discharge, which the court denied. On motion of the district attorney the court then made an order resubmitting the charge to another grand jury, to be impaneled at the next term of the court, to be held in the said Nez Perces county in September, 1898, and held the petitioner to answer any indictment that might be found against him on said charge, fixing his bail at the sum of \$8,000. Under the said order and the original commitment, the petitioner is restrained of his liberty, and confined in the jail of Nez Perces county, by said Barton, sheriff.

There is no showing that evidence other than that considered by the grand jury can or will be presented to another grand jury; there is no showing that any additional light tending to show the guilt of the accused can be produced, and there is no showing of improper conduct on the part of the grand jury or any of the grand jurors, or on the part of anyone else, intended to, or tending to, prevent the presentment of an indictment on said charge against the petitioner by said grand jury. We must

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therefore conclude, as the records appear to show, that the action of the grand jury in ignoring the said charge was honestly made, after a full and fair investigation and consideration of all of the evidence which was or could be adduced against the defendant, and that such evidence is insufficient to support the said charge, and that no indictment should be based thereon. Sections 8212 and 8213 of the Revised Statutes are as follows:

"Sec. 8212. The court, unless good cause to the contrary is shown, must order the prosecution or indictment to be dismissed, in the following cases: 1. When a person has been held to answer for a public offense, if an indictment is not found against him at the next term of the court at which he is held to answer; 2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial at the next term of the court in which the indictment is triable after it is found.

"Sec. 8213. If the defendant is not indicted or tried, as provided in the last section, and sufficient reason therefor is shown, the court may order the action to be continued from term to term, and in the meantime may discharge the defendant from custody on his own undertaking of bail for his appearance to answer the charge at the time to which the action is continued."

The causes for submitting the charge against the petitioner, contemplated by said sections of our statutes, were not shown. In fact, no cause whatever for resubmitting said cause, and holding the defendant to bail, was shown. Said statutes were enacted for the protection of both the state and the accused. But for a court to arbitrarily hold the accused to answer a charge of felony that has been fully and fairly investigated by a grand jury, and dismissed, in the absence of a showing that any further evidence can be produced, or a showing of improper conduct by the jury or jurors, by which a presentment by the grand jury has been defeated, would protect no right or interest of the state, but would work an unauthorized hardship and injustice upon the defendant. Inasmuch as the district court has submitted the charge against the petitioner to another grand jury, to be hereafter called, and this order is not before us for

Argument for Appellants.

review, we deem it proper to direct that the defendant be discharged, upon his executing and filing with the clerk of said district court his personal recognizance undertaking, in the sum of \$1,000, to answer any indictment that may be found against him on said charge; and it is so ordered.

Sullivan, C. J., and Huston, J., concur.

(May 6, 1898.)

WA-LA-NOTE-TKE-TYNIN v. CARTER.

[53 Pac. 106.]

JURISDICTION—INDIANS RECEIVING ALLOTMENTS OF LAND IN SEVERALTY ARE CITIZENS.—Under the provisions of section 6 of the act of Congress, February 8, 1897, providing for the allotment of lands to Indians, Indians of the Nez Perces tribe who have received and accepted allotments of land, and patents therefor, under the provisions of said act, are entitled to institute or defend actions in the state courts.

(Syllabus by the court.)

APPEAL from District Court, Nez Perces County.

Lane, Brown & Green, for Appellants.

We are to consider how far and to what extent the status of lands in an Indian country and Indians residing thereon has been effected by treaty and their occupying lands in severalty under trust patents as provided for in act of February 8, 1897. Sections 2147-2150 of the Revised Statutes of the United States provide for the formulation of rules for regulating possession of said lands. Rules 6633, 6634 and 6635 of the Regulations of Indian office in effect at present show to what extent such police authority is now exercised by the Indian Department. (See Allotment Law, 1 U. S. Stats., pp. 534 et seq. and 897.) Section 6 of former act makes them citizens, but we contend that their rights as citizens are not restricted but enlarged. That the United States still assumes a peculiar jurisdiction of those reservations and their inhabitants. (See Act of Con-

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gress, January 30, 1897, 29 U. S. Stats. 506. See case of *Eells v. Ross*, 64 Fed. 417 and cases there cited; *United States v. Flourney Livestock Co.*, 69 Fed. 886, 71 Fed. 576.)

James W. Reid, for Respondents.

Defendant's denial of the jurisdiction of the court raises the question as to what is the present status of the Nez Perces Indians since the treaty of October 31, 1892, and agreement of May 1, 1893, included in the act of Congress approved August 15, 1894. (28 U. S. Stats. at Large, 327.) Citizenship has been bestowed upon the Nez Perces Indians, and the only restriction is one imposed on their title to the allotted lands. (24 U. S. Stats. at Large, secs. 5, 6, p. 388; 28 U. S. Stats. at Large, p. 330, art. 449; 10 Am. & Eng. Ency. of Law, 411; Regulations of Indian Office of 1894, secs. 597-606; *United States v. Kagama*, 118 U. S. 375, 6 Sup. Ct. Rep. 1109; *Fellows v. Blacksmith*, 19 How. 366; *Langford v. Monteith*, 102 U. S. 145, *Utah etc. R. Co. v. Fisher*, 116 U. S. 28, 6 Sup. Ct. Rep. 246.)

HUSTON, J.—This is an action of ejectment. The plaintiffs and the principal defendant are Nez Perces Indians, who have received allotments of land in severalty, and patents for the land so allotted. A dispute as to boundary lines of the lands severally allotted to and patented to them having arisen between the plaintiffs and the principal defendant, the former brought their action of ejectment to recover the possession of the land in question, in the district court of Nez Perces county. To the complaint of the plaintiffs, defendants filed a demurrer raising the question of jurisdiction. Defendants (appellants here) insist that the state courts have no jurisdiction of either the parties or the subject matter. This is the only question involved in this case. The demurrer of appellants was overruled by the district court, and judgment entered in favor of plaintiffs, defendants having declined to answer. From this judgment appeal is taken by the defendants to this court.

Section 6 of the act of Congress of February 8th is as follows: "That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have

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been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside; and within its jurisdiction to equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits, his residence separate and apart from any tribe of Indians therein and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property." It seems clear to us, under the provisions of this section, that the Indians who have availed themselves of the provisions of said act, and complied with the exigencies thereof, have the same standing in the courts of the state as any other citizen of the United States. The judgment of the district court is affirmed, with costs.

Sullivan, C. J., and Quarles, J., concur.

(May 6, 1898.)

CHRISTENSEN v. HOLLINGSWORTH.

[53 Pac. 211.]

REFORMATION AND FORECLOSURE OF MORTGAGE—ALLEGATIONS OF MISTAKE.—Allegation, in complaint, that parties to a mortgage intended that certain land (describing it) should be described in and conveyed by such mortgage, and that the scrivener, in drawing the mortgage, omitted, through mistake, the number of the section in which such tract was situated and prays for reformation. *Held*, sufficient to grant reformation.

JOINDER OF ACTIONS.—A mortgage may be reformed and foreclosed in the same action.

Argument for Appellant.

MARRIED WOMAN—MISTAKE IN DESCRIPTION.—A clerical mistake in the description of land intended to be mortgaged by a married woman may be corrected upon a proper showing.

CERTIFICATE OF ACKNOWLEDGMENT OF MARRIED WOMAN.—A substantial compliance with the provisions of section 2960 of the Revised Statutes in the certificate of acknowledgment of a married woman is all that is necessary.

JURY TRIAL—EQUITABLE ACTIONS.—The guaranty found in section 7, article 1 of the constitution, that the right of trial by jury shall remain inviolate, was not intended to extend the right of trial by jury, but simply to secure that right as it existed at the date of the adoption of the constitution. Such provision does not guarantee a jury trial in equitable actions.

(Syllabus by the court.)

APPEAL from District Court, Latah County.

George W. Goode, for Appellant.

The court erred in sustaining plaintiff's complaint as to the reformation of the mortgage sued upon or in admitting any evidence in reference thereto. The complaint must not only set forth a mutual mistake, but must point out with clearness and precision all the attendant circumstances wherein the mistake lies, the original agreement, and that the mistake was not through the negligence of plaintiff. (*Lewis v. Lewis*, 5 Or. 169, 147; *Stephens v. Murton*, 6 Or. 193; *Barfield v. Price*, 40 Cal. 535, and cases cited; *Wright v. Shafter*, 48 Cal. 275.) Further, it has been held that a mortgage misdescribing the property must be corrected before foreclosure proceedings are begun. (*Davis v. Cox*, 6 Ind. 481; *Sibert v. McAvoy*, 15 Ill. 106; *French v. Griffin*, 18 N. J. Eq. 279.) The court refused to grant defendants a jury trial; the constitution of this state guarantees a jury for the trial of every issue of fact in a civil action, the distinction between law and equity being abolished. (State Const., art. 1, sec. 7; art. 5, sec. 1; North Carolina Const., 1875, art. 4, sec. 1; Proffatt on Jury Trial, sec. 89; *Taylor v. Person*, 2 Hawk. (N. C.) 298; *Faulk v. Faulk*, 23 Tex. 653; *Brown v. Burke*, 22 Ga. 574.) The decree is insufficient compared with the decree in the case of *Vermont Loan etc. Co. v. McGregor*, 5 Idaho, 320, 51 Pac. 102. No reformation of an instrument can be had as against a *feme covert*, especially when such reformation is for the purpose of compelling her to convey more

Argument for Respondent.

property than the instrument already conveys. (*Montana Nat. Bank v. Schmidt*, 6 Mont. 609, 13 Pac. 382; 14 Am. & Eng. Ency. of Law, 632, 635, 636, note 1; *Leonis v. Lazzarovich*, 55 Cal. 52; *Barrett v. Tewksbury*, 9 Cal. 14; *Reis v. Lawrence*, 63 Cal. 129, 49 Am. Rep. 83, and note; *Cox v. Woods*, 67 Cal. 317, 7 Pac. 722.) The evidence stands uncontradicted, "that at the time of executing this mortgage Mrs. Hollingsworth knew nothing of its contents, no one read or explained the same to her, and that when she signed this instrument her husband was present, in fact directed her where and how to sign." (Rev. Stats., secs. 2921, 2922, 2956; 1 Am. & Eng. Ency. of Law, 2d ed., 512, 514 et seq., 519; 14 Am. & Eng. Ency. of Law, 629; *Hutchinson v. Ainsworth*, 63 Cal. 286; *Beck v. Soward*, 76 Cal. 527, 18 Pac. 650; *Bollinger v. Manning*, 79 Cal. 7, 21 Pac. 841; *Leonis v. Lazzarovich*, 55 Cal. 52.)

Sweet & Steele, for Respondent.

The second alleged error is that a suit to reform and foreclose cannot be enforced in the same action. The question has been so often decided adverse to appellants that we are astonished that the court's attention is not called to some of these decisions. The court's attention is respectfully called to Bliss on Code Pleading, sections 166-172. (*Hutchinson v. Ainsworth*, 73 Cal. 452, 2 Am. St. Rep. 823, 15 Pac. 82.) Clerical mistakes affecting the description in a conveyance by a married woman may be corrected, and by such correction the object and policy of the statute as to the conveyance of the separate property of a married woman are not controverted. (Jones on Mortgages, 3d ed., sec. 99; *Hamer v. Medsker*, 60 Ind. 413; *Carper v. Munger*, 62 Ind. 481; *Hayford v. Kocher*, 65 Cal. 389, 4 Pac. 350; *Savings etc. Society v. Meeks*, 66 Cal. 371, 5 Pac. 624.) The acknowledgment of the mortgage is attacked. If the certificate of the officer substantially complies with the law it must be taken as a correct statement and cannot be impeached except for fraud, duress or mistake. (*Banning v. Banning*, 80 Cal. 271, 13 Am. St. Rep. 156, 22 Pac. 210; Jones on Mortgages, sec. 538.) The certificate of the officer taking an acknowledgment is required to be a substantial compliance with

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the form prescribed in the statute, section 2960. (*Northwestern Bank v. Rauch*, 5 Idaho, 750, 51 Pac. 764.)

SULLIVAN, C. J.—This action was brought by the respondent, Christensen, to reform and foreclose a certain real estate mortgage given to secure certain promissory notes. The answer denies the execution of said mortgage, and, as another and separate defense, avers that the defendants (who are appellants here) are, and were at the date of the execution of said mortgage, husband and wife, and that they occupied the premises described in the complaint as a residence; that the same was community property; and that the acknowledgment of the execution of said mortgage by the said Mary E. Hollingsworth was not taken as required by the provisions of section 2956 of the Revised Statutes of Idaho, in that she was not made acquainted with the contents of said mortgage by the officer taking the acknowledgment, on an examination without the hearing of her husband; and that said mortgage is void for that reason. When the cause was reached for trial, the appellants demanded that the issues of fact be tried by a jury, which was denied by the court. Trial was had to the court without a jury, and judgment and decree of reformation and foreclosure were made and entered in favor of the respondent. Thereupon, a motion for a new trial was interposed by the appellants, and overruled by the court. This appeal is from the judgment and the order overruling the motion for a new trial.

The admission of any evidence sustaining the allegations of the complaint touching the reformation of the mortgage is assigned as error. It is contended that the allegations of the complaint are not sufficient, in this, to wit: It fails to allege mutual mistake, with all of its attendant circumstances, and fails to allege that such mistake was not through the negligence of the plaintiff. While the allegations are not as full and complete as the facts, as shown by the evidence, would warrant, we think they are sufficient to allow the introduction of testimony to show whether it was the intention of the defendants to include said eighty-acre tract of land in said mortgage, and show whether the omission of the number of the section in which said tract was situated was omitted from said description through mistake of the person who drew said mortgage.

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It is contended that a mortgage cannot be reformed and foreclosed in the same action, and that the court erred in permitting reformation and foreclosure in the same action. There is nothing in this contention. The recognized rule under our Code of Civil Procedure is that a mortgage may be reformed and foreclosed in the same action. In *Hutchinson v. Ainsworth*, 73 Cal. 453, 2 Am. St. Rep. 823, 15 Pac. 82, it is held that a complaint which seeks to reform a mortgage, and to foreclose the same as reformed, states but one cause of action. (See, also, Bliss on Code Pleading, secs. 166-172.)

It is also contended that no reformation of an instrument can be had against a married woman, especially when such reformation is for the purpose of compelling her to convey more property than the instrument already conveys. The mortgage in question was executed on the twenty-seventh day of November, 1893, and contains descriptions of three distinct parcels or tracts of land. The alleged mistake occurs in the first description, which describes an eighty-acre tract, except that it fails to state the number of the section in which said tract is situated. In a subsequent mortgage given by these appellants to the Plano Manufacturing Company on the eleventh day of May, 1894, they admitted that said eighty-acre tract was included in the mortgage involved in this action. Under all of the evidence found in the record, it is clearly shown that it was the intention of the defendants to include said eighty-acre tract in said mortgage, and through the mistake of the draftsman the number of the section was omitted. By the reformation of said mortgage no new right is conferred. It is merely carrying into effect the intention of the parties. If such mistake could not be corrected, gross injustice would result. Equity looks on that as done which ought to be done. The object and policy of our statutes in regard to the transfer or conveyance of the separate property of the wife, or of the property on which the husband and wife may reside, are not controverted or thwarted by permitting such reformation. (*Society v. Meeks*, 66 Cal. 371, 5 Pac. 624; *Hayford v. Kocher*, 65 Cal. 389, 4 Pac. 350.) A mistake in the description of land intended to be conveyed or mortgaged by a married woman may be corrected upon a proper showing. (*Hamar v. Medsker*, 60 Ind. 413; *Carper v.*

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Munger, 62 Ind. 481; *Jones on Mortgages*, 3d ed., sec. 99; *Dembitz on Land Titles*, sec. 54; *Tichenor v. Yankey*, 89 Ky. 508, 12 S. W. 947.) It is contended that the certificate of acknowledgment to said mortgage is defective, and not in compliance with the provisions of section 2960 of the Revised Statutes. The certificate is as follows:

"State of Idaho, }
County of Latah } ss.

"I, J. I. Mitcham, justice of the peace in and for said county, in the state aforesaid, do hereby certify that A. P. Hollingsworth and Mary E. Hollingsworth, his wife, personally known to me as the real persons whose names are subscribed to the foregoing deed, appeared before me this day in person, and acknowledged that they executed and delivered the said deed, as their free and voluntary act, for the uses and purposes therein set forth. And I further certify that Mary E. Hollingsworth, wife of said A. P. Hollingsworth, acknowledged to me, on an examination apart from, and without the hearing of, her husband, and after I had made known to her the contents of said instrument, that she executed the same freely and voluntarily, without fear or compulsion, or under influence of her husband, and that she did not wish to retract the execution of the same. Given under my hand and official seal this twenty-seventh day of November in the year of our Lord 1893.

"J. I. MITCHAM,
"Justice of the Peace."

Said certificate does not follow in the exact words of the statute, nor is it necessary that it should be so. A substantial compliance with the provisions of said section is all that is required, and we think said certificate substantially complies therewith. (*Northwestern Bank v. Rauch*, 5 Idaho, 750, 51 Pac. 764.)

It is contended, under the provisions of section 7, article 1, and section 1, article 5, of the constitution of Idaho, that the defendants were entitled to have the issues of fact tried by a jury, and that the court erred in denying appellants' motion for a jury trial. Section 7, article 1, is as follows: "The right of trial by jury shall remain inviolate; but in civil actions three-

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fourths of the jury may render a verdict, and the legislature may provide that in all cases of misdemeanor five-sixths of the jury may render a verdict. A trial by jury may be waived in all criminal cases not amounting to felony by the consent of both parties, expressed in open court, and in civil actions by the consent of the parties, signified in such manner as may be prescribed by law. In civil actions and cases of misdemeanor the jury may consist of twelve, or of any number less than twelve upon which the parties may agree in open court." Section 1, article 5, is as follows: "The distinctions between actions at law and suits in equity, and the forms of all such actions and suits, are hereby prohibited; and there shall be in this state but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action; and every action prosecuted by the people of the state as a party against a person charged with a public offense for the punishment of the same, shall be termed a criminal action. Feigned issues are prohibited, and the fact at issue shall be tried by order of the court before a jury." Said section 7, article 1, of the constitution, declares, *inter alia* that "the right of trial by jury shall remain inviolate"; and section 1, article 5, declares: "The distinctions between actions at law and suits in equity, and the forms of all actions and suits, are hereby prohibited," etc. It is the settled doctrine in a number of states having constitutional provisions similar to those above cited that those provisions must be read in the light of the law existing at the time of the adoption of the constitution. Said provisions were not intended or designated to extend the right of trial by jury, but simply to secure that right as it existed at the date of the adoption of the constitution. (*City Council v. O'Donnell*, 29 S. C. 355, 13 Am. St. Rep. 728, 7 S. E. 523; *Lynch v. Metropolitan etc. Ry. Co.*, 129 N. Y. 274, 26 Am. St. Rep. 523, 29 N. E. 315; *Heacock v. Hosmer*, 109 Ill. 245; *Commercial Ins. Co. v. Scammon*, 123 Ill. 604, 14 N. E. 666; *Ex parte Schmidt*, 24 S. C. 363.) The guaranty that "the right to trial by jury shall remain inviolate" has no reference to equitable cases. (*Flaherty v. McCormick*, 113 Ill. 538; *Ward v. Farwell*, 97 Ill. 593; *Heacock v. Hosmer*, *supra*.)

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This being an equitable action, it was not error to deny defendants' application for a jury trial.

We have made a careful examination of each error assigned, and find no error in the record. The judgment and decree of the trial court are therefore affirmed, with costs of this appeal in favor of the respondent.

Huston and Quarles, JJ., concur.

(May 28, 1898.)

CHRISTENSEN v. HOLLINGSWORTH ET UX.

[53 Pac. 271.]

On petition for rehearing. Denied.

For former opinion, see ante, p. 87, 53 Pac. 211.

Per CURIAM.—The petition for a rehearing in this case is based upon the claim that the court in its decision overlooked the contention of appellant that the certificate of acknowledgment of the mortgage was false; that no acknowledgment of said instrument was ever made by the defendant Mary E. Hollingsworth. Perhaps the conclusion of the court is not sufficiently clear in the decision filed, in that it is confined to the form of the certificate, and does not expressly pass upon the contention of appellant that no acknowledgment was ever made by the defendant Mary E. Hollingsworth. The record shows the following facts, which are practically undisputed: The mortgage was drawn by the attorney of the respondent in the presence of the defendant, A. P. Hollingsworth, and one J. I. Mitcham, the justice of the peace who certified that he took the acknowledgment of both defendants to the mortgage, and said mortgage was delivered by said attorney to either Hollingsworth or Mitcham (it does not clearly appear which), to be taken to Kendrick, and there to be executed and acknowledged and returned to said attorney. The mortgage was returned to the said attor-

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ney, purporting to have been duly executed and acknowledged before the said J. I. Mitcham, justice of the peace, and the son in law of the defendant mortgagors. In the light of this record, the reiterated cry of fraud by counsel for the petitioner is not resonant of fairness, to put it very mildly.

Counsel contends that there is no conflict of evidence upon the question of taking the acknowledgment of Mary E. Hollingsworth. This contention, or rather assertion, is not correct. There is the certificate of the officer taking the acknowledgment, the verity of which can only be overcome by evidence which establishes its falsity to the satisfaction of the court beyond a reasonable doubt. Doubtless, the district court did not consider the evidence of such officer's wife and mother in law sufficient to warrant it in coming to a conclusion which would subject a man of Mr. Mitcham's standing and reputation to the penalties of section 6530 of the Revised Statutes of Idaho, as well as make him responsible in damages to the mortgagee. And we fully concur with the district court therein. Counsel, in his petition for a rehearing, devotes considerable space to what we conceive to be an uncalled for and unwarranted attack upon the counsel for respondent. This practice by counsel of making papers in an *ex parte* proceeding, or in any proceeding, for that matter, a medium of personal attack, or the airing of personal grievances, either real or imaginary, is decidedly reprehensible, and will not be tolerated by this court. Rehearing denied.

(May 9, 1898.)

WALLACE v. MCKINLAY.

[53 Pac. 104.]

UNDERTAKING ON APPEAL—VOID FOR UNCERTAINTY.—On an appeal from a judgment and from an order sustaining a demurrer to defendants' amended answer and undertaking, which provides "that said appellants will pay all damages and costs which may be awarded against them on the appeal or on a dismissal thereof, only, without reference to either appeal, is insufficient.

(Syllabus by the court.)

Opinion of the Court—Huston, J.

APPEAL from District Court, Shoshone County.

H. T. Samuels and Jones & Morphy, for Appellants.

No brief filed.

C. W. Beale, for Respondent, cites no authorities upon the point on which the court dismissed the appeal, to wit, for the want of an undertaking on appeal.

HUSTON, J.—This was an appeal from a judgment and from an order sustaining plaintiff's demurrer to defendants' amended answer. A motion to dismiss the appeal was filed by respondent. The motion enumerates several grounds, but upon the hearing but one ground was argued, viz., the insufficiency of the undertaking. The undertaking provided only "that said appellants will pay all damages and costs which may be awarded against them on the appeal or on a dismissal thereof," without any reference to which appeal it was intended to apply. It is urged by the appellants that, as the order sustaining the demurrer was not an appealable order, the appeal therefrom should be treated as surplusage, and the undertaking be sustained upon the appeal from the judgment. We cannot agree with this contention. Appellants appealed from both the order and the judgment and the undertaking covering but one appeal. It is not the province of this court to say to which appeal it is intended to apply. Appellants must stand or fall by the record they have presented to this court. Under repeated rulings of this court, the motion to dismiss is allowed, with costs to respondent. (See *Kelly v. Leachman*, decided by this court, and reported in 5 Idaho, 521, 51 Pac. 407, and cases there cited.)

Sullivan, C. J., and Quarles, J., concur.

Argument for Petitioner.

(May 9, 1898.)

COEUR D'ALENE RAILWAY AND NAVIGATION COMPANY v. SPALDING.

[53 Pac. 107.]

JURISDICTION—TRANSFER OF CAUSE TO UNITED STATES CIRCUIT COURT — CIRCUIT COURT REMANDS TO STATE COURT—EQUITABLE ESTOPPEL TO QUESTION JURISDICTION.—The circuit court of the United States, to which a cause has been transferred or removed from a state court, is the sole judge as to whether the cause was properly removed or not, and its order remanding the case back to the state court is binding upon the parties, and should be respected by the state courts. After the lapse of more than six years from the making of an order by the United States circuit court, to which a cause had been removed from a state court, remanding said cause back to the state court, and after an appeal from said judgment by the defendant on a record absolutely silent as to any question of jurisdiction on the part of the state courts, the said judgment was affirmed by the state supreme court, after which said defendant filed a petition for a writ of review, on the ground that the state courts had no jurisdiction. *Held*, that the petitioner is estopped from questioning the jurisdiction of the state courts, and the writ demanded should be denied.

(Syllabus by the court.)

An original proceeding by petition for writ of review.

John T. Morgan, William T. Stoll, and Stephens, Bunn & McDonald, for Petitioner.

The making and filing of the "written request" by the petitioner in the district court of the state invested the circuit court of the United States, *eo instanti*, with exclusive jurisdiction of the case and divested the state court of any pretended jurisdiction that it had. (*Koenigsberger v. Richmond Silver Min. Co.*, 158 U. S. 41, 15 Sup. Ct. Rep. 751; *Carr v. Fife*, 156 U. S. 494, 15 Sup. Ct. Rep. 427; *Ames v. Colorado Cent. R. R. Co.*, 4 Dill. 251, Fed. Cas. No. 324; *New Orleans v. Winter*, 1 Wheat. 90; *Barney v. Baltimore*, 6 Wall. 280, 287; *Freeborn v. Smith*, 2 Wall. 160; *Express Co. v. Kountze*, 8 Wall. 342, 350, 351;

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Baker v. Morton, 12 Wall. 150, 153; *Dorne v. Richmond Co.*, 1 S. Dak. 20, 44 N. W. 1021; *Herman v. McKinney*, 43 Fed. 689; *Miller v. Sunde*, 1 N. Dak. 1, 44 N. W. 301; *Blackburn v. Wooding*, 56 Fed. 545, 15 U. S. App. 84; *Washington etc. R. R. Co. v. Coeur d'Alene Ry. & Nav. Co.*, 160 U. S. 77, 16 Sup. Ct. Rep. 231.) There is authority to the effect that a stipulation of the parties to remand, coupled with an order of the court, does not divest the circuit court of jurisdiction or invest the state court with power to take the first step. (*Lawton v. Blich*, 30 Fed. 641.) The judgment pretended to be rendered by the district court on the 25th of April, 1896, is void for want of jurisdiction. (1 Black on Judgments, secs. 170, 218; *Beverly v. Burke*, 9 Ga. 440, 54 Am. Dec. 351; *Central Bank v. Gibson*, 11 Ga. 453; *Johnson v. Johnson*, 30 Ill. 215; *Swiggart v. Harber*, 4 Scam. 364, 39 Am. Dec. 418; *Miller v. Snyder*, 6 Ind. 1; *Seeley v. Reid*, 3 Greene (Iowa), 374; *Elliott v. Piersol*, 1 Pet. 328.) Two courts cannot have jurisdiction of the same case. (*Railroad Co. v. Koontz*, 104 U. S. 14; *Steamship Co. v. Tugman*, 106 U. S. 122, 1 Sup. Ct. Rep. 58; *Railroad Co. v. Mississippi*, 102 U. S. 135; *Kern v. Huidekoper*, 103 U. S. 485; *Insurance Co. v. Dunn*, 19 Wall. 214.) The uniform holding of the supreme court of the United States is to the effect that a state court proceeding with a cause, and attempting to exercise jurisdiction after the filing of the petition and bond, where the bond is required, is acting without authority, and its action is absolutely void. (*National Bank v. Colby*, 21 Wall. 609; 3 Myers' Fed. Dec. 261, 265, 344; *Harvey v. Allen*, 16 Blatchf. 29-47, Fed. Cas. No. 6177.)

Willis Sweet, for Defendant.

No brief filed.

QUARLES, J.—The plaintiff filed its petition for a writ of review. This court made an order that defendants show cause, at the regular term of this court held at Lewiston on the eighteenth day of April, 1898, why a writ of review should not issue. To said petition and order to show cause the defendants filed their response. The petitioner alleges: That it is a corporation

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organized and existing under the laws of the territory (now state) of Montana, and doing business in Idaho. That on the twenty-fourth day of March, 1887, the respondent, Spalding, as plaintiff, commenced an action in the district court of the first judicial district of the territory (now state) of Idaho in and for Kootenai county, against the petitioner, as defendant, to recover upon a building contract a sum greater than \$2,000, exclusive of interest and costs, in which action summons was issued and served; and that the petitioner here, as such defendant, filed its answer denying the allegations of said plaintiff's complaint in all respects. That after the admission of the state of Idaho into the Union by the act of Congress approved July 3, 1890, and while said action was so pending and undetermined in the said district court, to wit, on September 2, 1890, the petitioner, under the provisions of section 18 of the said admission act, made and filed in said court a written request to transfer the said action from the said district court of Idaho territory to the United States circuit court for the district of Idaho, on the ground that the plaintiff in said action, the said Spalding, was a citizen of Idaho, and the said petitioner, defendant therein, was then a citizen of the state of Montana. That thereupon the judge of the said district court of Idaho, made, on said last-named day, an order transferring the said cause from the said district court of the state of Idaho, to the circuit court of the United States for the district of Idaho. That on the thirteenth day of November, 1895, the district court of the first judicial district of Idaho in and for Kootenai county, over the objection and against the protest of the said petitioner, unlawfully assumed jurisdiction of said cause, and then and there proceeded, over the objection of the petitioner, to try and determine the same, and did, on the twenty-fifth day of April, 1896, unlawfully enter a judgment in favor of the plaintiffs therein, and against the petitioner, for the sum of \$34,727.90 and costs, taxed at \$1,857.05. That said district court, in trying and determining said cause, exceeded its jurisdiction, and that said judgment is void, and that the plaintiff has no speedy or adequate remedy to correct such unlawful assumption of jurisdiction by the said district court of the said state of Idaho. That

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said pretended judgment has been assigned by the respondent Spalding to the respondent Sweet, who now claims to own the same. The answer filed by the respondents alleges the following facts: That the order made transferring said action from the said district court of Idaho to the United States circuit court was made by the consent of all of the parties to said action, and on the written request of the petitioner. That pursuant to the order transferring said cause to the said circuit court, all of the files, records and papers of said cause were, by the clerk of said state court, transferred to the United States circuit court for the district of Idaho. That thereafter, and on Wednesday, July 1, 1891, the said circuit court of the United States for the district of Idaho, on its own motion, remanded said cause back to the district court of the first judicial district of the state of Idaho in and for said Kootenai county, and thereafter all of the files, documents, and records in said cause were returned by the clerk of the said United States circuit court to the said district court. That no motion was made in said state district court with reference to the jurisdiction of said court, and no order made by said state district court in said action with reference to its jurisdiction therein, as is shown by the records of said district court. That said cause was continued from time to time, and from year to year, until the thirteenth day of November, 1895, when said cause was heard in said state court, which afterward, and on April 25, 1896, rendered judgment in favor of the plaintiff. That after the rendition of said judgment, the petitioner here moved for a new trial in said state district court, which motion was duly presented and considered, and by said court overruled. That the petitioner here thereupon appealed to the supreme court of the state of Idaho from the order of the state district court denying petitioner's motion for a new trial, and that on said appeal the petitioner filed in said supreme court a transcript and the complete record upon which said appeal was based, which transcript, prepared by petitioner's attorneys, was silent as to any order, motion, ruling of the court, or exceptions of the parties relating to the jurisdiction of said state district court; and the petitioner, on its said appeal, submitted its claims, rights and interests in the prem-

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ises to the said supreme court of the state of Idaho without exception or objection to the exercise of jurisdiction, either on the part of the said state, district or supreme courts. That at the October term of said supreme court of the state of Idaho the said cause was heard upon the transcript so prepared, the briefs, and oral arguments of the counsel for the respective parties, and submitted to the consideration of the said court, which court afterward entered its judgment in said cause affirming the order denying a new trial so appealed from, and by *remittitur* returned to said district court its said judgment in the premises according to law.

On the hearing of the order to show cause why the writ demanded in this proceeding should not issue, the attorneys for the petitioner agreed and admitted in open court that the allegations of fact made in the petition which are denied by the answer of the respondents are not true, and that the affirmative allegations of fact in said answer are true. The petitioner based its right to the writ demanded upon a question of law, contending that the filing of the written request in the state district court for a transfer of the cause to the United States circuit court, followed as it was by an order transferring it to said circuit court, divested the state court of jurisdiction, and that the order made by the United States circuit court remanding the cause back to the state district court was void, the said circuit court having no jurisdiction to make such order. We regard the conclusion irresistible that the writ demanded must be denied, for the following reasons, to wit:

1. The United States circuit court, to which the cause was removed, was the forum to decide whether the cause was properly transferred to said court or not. That court, having decided that the cause was improperly transferred to it, made an order remanding the cause back to the state court. Such order was binding upon both parties, and comity required the state court to treat said order as valid and binding. It would have been an unwarranted act of discourtesy, as well as flagrant disrespect, for the state court to have held that the circuit court of the United States had no jurisdiction to make the order remanding the cause back to the state court. That the circuit

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court of the United States to which said cause was transferred was the proper court to decide whether the cause should be transferred to it, or remanded back to the state court, we think it settled by the act of Congress of August 13, 1888 (25 Stats. 432), amending the act of March 3, 1887, a portion of section 2 of which is in the following language: "Whenever any cause shall be removed from any state court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed." The rule laid down by this statute follows the decision of the supreme court of the United States in *Stone v. South Carolina*, 117 U. S. 431, 6 Sup. Ct. Rep. 799. True it is that the supreme court of the United States in a number of cases, notably in *Steamship Co. v. Tugman*, 106 U. S. 118, 1 Sup. Ct. Rep. 58, have held that upon the filing of a proper petition and bond for removal from the state court to the United States circuit court, the jurisdiction of the state court ceases, and the jurisdiction of the United States court immediately attaches, and that all orders made by the state court in the cause after the filing of the petition and bond are *coram non jndice*, unless the jurisdiction of the latter court shall actually be restored. This rule is not only reasonable, but necessary. In the case of *Steamship Co. v. Tugman*, the state courts ignored the petition and bond for removal. The cause was tried in the state circuit court of New York, appealed to the state supreme court, which affirmed a judgment against the parties petitioning for removal, and from such judgment of affirmance an appeal was taken to the court of appeals of New York, which affirmed the judgment of the state supreme court. In this case the party petitioning for removal objected to the jurisdiction of each of said state courts. And in that case there was no claim that the jurisdiction of the state court had been restored by a remand of the cause back to the state court. In the case at bar the state courts properly transferred the cause on the showing made, but its jurisdiction was restored by the order of the United States circuit court remanding the cause back to it.

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On what ground the United States circuit court remanded the cause back to the state court does not appear in the record before us, but we must conclude that its action was proper, based on sufficient grounds, authorized by the act of Congress cited *supra*, and binding on both parties to the action, and fully restored the jurisdiction of the state trial court.

2. After the judgment in the district court in the first judicial district of Idaho in and for Kootenai county, the petitioner brought the cause on appeal into this court upon a record absolutely silent as to the filing of the request for a transfer to the United States circuit court, and silent as to the fact that an order had been made transferring the cause. The transcript was voluminous, and devolved much work upon this court. The petitioner, as appellant, brought the respondent into this court on said appeal at much expense to said respondent. The petitioner on said appeal did not question the jurisdiction of the state district court, but voluntarily sought a final determination by this court of the matters in controversy in said cause. We think that after the lapse of more than six years from the making of the order by the United States circuit court remanding the cause back to the state district court, and after the petitioner has voluntarily sought the jurisdiction of this court for the purpose of determining the correctness of the judgment against it in the trial court, on a record which is absolutely silent as to any question of want of jurisdiction in the state courts, the petitioner is, by every sound rule of law and principle of equity, estopped from now questioning the jurisdiction of the state courts. The course pursued by the petitioner in said cause and in this proceeding is neither fair to the trial court, to this court, nor to the respondents. The writ demanded is denied, with costs to the defendants.

Sullivan, C. J., and Huston, J., concur.

Opinion of the Court.

(May 9, 1898.)

LEWISTON NATIONAL BANK v. TEFFT.

[53 Pac. 271.]

PRACTICE—NONJOINDER OF PARTIES—ADVERSE PARTY.—In an appeal by one of two defendants from a judgment and decree of foreclosure, wherein a joint judgment was rendered against both, the defendant not joining in the appeal is an adverse party, and should be served with notice of appeal.

(Syllabus by the court.)

APPEAL from District Court, Idaho County.

James W. Reid, for Appellants, cites no authorities on the point decided by the court.

James E. Babb, for Respondent, files no brief.

HUSTON, J.—This is an action to foreclose a mortgage executed by Albert P. Tefft and Carrie M. Tefft. A joint judgment and decree was rendered against both. From this judgment and decree Carrie M. Tefft appeals. There were other parties made defendants, some of whom appeared; others made default.

Two of the defendants, Carrie M. Tefft and Mary E. Osborn, join in the appeal. Respondent moves to dismiss the appeal upon the ground that no notice of appeal was served upon Albert P. Tefft, against whom a joint judgment was rendered. Under the rule as given by this court in *Lydon v. Godard*, 5 Idaho, 607, 51 Pac. 459, Albert P. Tefft was an adverse party, and should have been served with notice of appeal. (See *Lydon v. Godard*, *supra*, and cases there cited.) Motion allowed, and appeal dismissed, with costs to respondent.

Sullivan, C. J., and Quarles, J., concur.

ON REHEARING.

(May 27, 1898.)

Per CURIAM.—The petitioner claims that as Tefft has been released from all liability under the judgment of foreclosure, and the deficiency judgment against him had been satisfied,

Argument for Appellants.

he was no longer interested in the appeal, was not an adverse party, and therefore entitled to service of the notice of appeal. The release of the defendant Tefft from all liability under the judgment of foreclosure as well as the deficiency judgment was based upon the validity of the judgment. If, upon appeal, the judgment of foreclosure was reversed, set aside, or invalidated, the consideration for the release failed, and the plaintiff's right of action against Tefft was thereby revived, under the provisions of section 4498 of the Revised Statutes of Idaho. (*Cantwell v. McPherson*, 3 Idaho, 321, 29 Pac. 102, and cases there cited.) As stated by this court in *Cantwell v. McPherson*, *supra*, there is no difference, under the statutes of Idaho, between a sale under an execution and one upon an order of sale upon foreclosure of mortgage. The reversal or modification of the judgment upon appeal revived the liability of the defendant Tefft upon the original contract. How can it be said, then, that he was not an interested party? Rehearing denied.

(May 9, 1898.)

VERMONT LOAN AND TRUST COMPANY v. TETZLAFF.

[53 Pac. 104.]

FORECLOSURE OF MORTGAGE—USURY—SUIT PREMATURELY BROUGHT.—

In an action brought to foreclose a mortgage, upon the ground that default had been made in the payment of coupon interest notes, which coupon interest notes are declared to be usurious and void (see decisions of this court in *Vermont Loan Trust Co. v. Hoffman*, 49 Pac. 314), the principal note not being due at the time of the commencement of the suit, *held*, that the action is prematurely brought.

(Syllabus by the court.)

APPEAL from District Court, Latah County.

George W. Goode, for Appellants.

Inasmuch as the contract sued upon is usurious, the respondents could recover no interest; therefore the action could not be brought until the maturity of the principal note; as the non-

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payment of interest is no default whatever, the court could have no jurisdiction of the subject matter, and the judgment would be null and void. In the case at bar the action is brought some two years before a cause of action arose under the contract. The pleadings must in all cases support the judgment, and where the complaint shows on its face that the demand sued upon is not yet due, the judgment or decree based thereon is void. (*Vermont Loan etc. Co. v. Hoffman*, 5 Idaho, 376, 49 Pac. 314; *Harmon v. Ashmead*, 61 Cal. 439; 5 Am. & Eng. Ency. of Law, 483, and notes; 12 Am. & Eng. Ency. of Law, 71, and notes; *Beckett v. Cuenin*, 22 Am. St. Rep. 402, note; *Duluth Nat. Bank v. Knoxville Fire Ins. Co.*, 85 Tenn. 76, 4 Am. St. Rep. 750, 1 S. W. 689; *Chase v. Whitten*, 51 Minn. 485, 53 N. W. 767.)

A. E. Gallagher, for Respondent.

No brief filed

HUSTON, J.—This is an action brought by the plaintiff to foreclose a mortgage executed by the defendants Aaron Tetzlaff and Minnie Tetzlaff, his wife, to the plaintiff, to secure the payment of the sum of \$1,125, with interest, on the first day of January, 1897, which indebtedness is evidenced by one principal note for said sum of \$1,125, payable, with interest at the rate of seven per cent per annum, on said first day of January, 1897, to which said principal note is attached five coupon interest notes, bearing even date with said principal note, and signed by said Aaron Tetzlaff and Minnie Tetzlaff, his wife, and payable, respectively, on the first day of January, 1893, 1894, 1895, 1896, and 1897. Each of said coupon interest notes bears interest at the rate of twelve per cent per annum after maturity. It was provided in said principal note that if default should be made in the payment of any interest note, or any part thereof, for the space of ten days after the same should become due and payable, then said principal and accrued interest should, at the election of the holder of said note, become at once due, without further notice. Said defendants Tetzlaff, as is alleged in the complaint, duly paid said interest coupon notes due, respectively, on the first day of January, 1893 and 1894, as the same become due;

Opinion of the Court—Huston, J.

but to pay the interest coupon note which fell due January 1, 1895, said defendants Tetzlaff neglected and refused, whereupon plaintiff, under the provisions contained in said principal note and mortgage, elected to, and did, declare the said principal sum, and all accrued interest thereon, then due, and on the 30th of September, 1895, commenced this action to foreclose said mortgage. The complaint contains a prayer for the reformation of the mortgage sued on, in certain particulars. The defendants Derham and Kaufman made default. The defendants' Aaron Tetzlaff and Minnie Tetzlaff filed a demurrer to the complaint, setting up first that the complaint does not state facts sufficient to constitute a cause of action, and also other specific grounds, which, under our view of the case, it is not essential to consider. The principal debt, to secure which, with the interest, the mortgage was given, was not due at the time the suit was commenced to foreclose, nor would it be until a year and three months thereafter. The plaintiff's right to commence suit to foreclose its mortgage, therefore, must rest entirely upon the aforementioned provision in the principal note and mortgage, to wit, the failure by defendants to pay any or either of said coupon interest notes, or any part thereof, as the same become due and payable. We held in *Trust Co. v. Hoffman*, 5 Idaho, 376, 49 Pac. 314, that such coupon interest notes were usurious and void, under the provisions of section 1266 of the Revised Statutes of Idaho. Could the failure by the defendants to pay a debt which they could not be required to pay, for the reason that it was void, be made a predicate upon which to base an action against them for the recovery of a debt which could only be declared to be then due because of defendants' failure or refusal to pay such void debt? We think not. Under the statutes of this state and the decisions of this court thereon, the plaintiff could only recover the principal debt, without interest or costs. The recovery of the principal debt being the limit of its remedy, it could only invoke that remedy after the principal debt became due. The action was prematurely brought. The judgment of the district court is reversed, and the cause is remanded to the district court, with instructions to dismiss the complaint. Costs to appellants.

Sullivan, C. J., and Quarles, J., concur.

Opinion of the Court—Huston, J.

(May 9, 1898.)

VERMONT LOAN AND TRUST COMPANY v. MAXWELL

[53 Pac. 1130.]

Syllabus in this case same as in *Vermont Loan etc. Co. v. Tetzlaff*, decided at this term, ante, p. 105.

APPEAL from District Court, Latah County.

George W. Goode, for Appellant.

The same question which is submitted by appellants in the case of *Vermont Loan and Trust Co. v. Aaron Tetzlaff et al.*, in this term of this court, which is, "That the contract sued upon, being usurious, the action is prematurely brought on a default of payment of interest." The principal note sued upon matured December 1, 1897, this complaint was filed August 21, 1895. (*Vermont Loan etc. Co. v. Hoffman*, 5 Idaho, 376, 49 Pac. 314; *Harmon v. Ashmead*, 61 Cal. 439; 5 Am. & Eng. Ency. of Law, 483, notes; 12 Am. & Eng. Ency. of Law, 71; notes, *Brackett v. Cuenin*, 15 Colo. 281, 22 Am. St. Rep. 402, and note, 25 Pac. 167; *Duluth Nat. Bank v. Knoxville Fire Ins. Co.*, 85 Tenn. 76, 4 Am. St. Rep. 750, 1 S. W. 689; *Chase v. Whitten*, 51 Minn. 485, 53 N. W. 767.)

A. E. Gallagher & R. T. Morgan, for Respondent.

No brief filed.

HUSTON, J.—This case involving the same question decided in *Vermont Loan etc. Co. v. Tetzlaff et al.*, ante, p. 105, the judgment of the district court is reversed and the cause remanded with instructions to dismiss the complaint.

Costs to appellant.

Sullivan, C. J., and Quarles, J., concur.

Argument for Appellant.

(May 10, 1898.)

STATE v. ST. CLAIR.

[53 Pac. 1.]

CRIMINAL LAW—CONTINUANCE OVER TERM.—Where an application for a continuance of the trial over the term is based upon the absence of witnesses, and the state offers to admit that if present the witnesses would testify as set forth in the affidavit upon which the application for a continuance is based, it is not error in the trial court to refuse the continuance. (*Territory v. Guthrie*, 2 Idaho, 398.)

SAME—CHANGE OF VENUE.—The granting of a change of venue in a criminal case is largely in the discretion of the trial court, and where such application is based solely upon the affidavit of the defendant, the action of the trial court in refusing a change of venue will not be interfered with.

SAME—INFORMATION—DESCRIBES DECEASED AS JOHN DOE.—Where the information for murder described the deceased as one John Doe, whose true name was unknown to the district attorney who filed the indictment, and on the trial it was proven that the name of the deceased was John L. Decker, there was no material variance. (Idaho Rev. Stats., sec. 7683.)

WHEN QUESTIONS WILL NOT BE CONSIDERED.—Where the record shows no evidence in the court below upon the question of the insanity of the defendant, this court will not entertain or consider that question.

(Syllabus by the court.)

APPEAL from District Court, Boise County.

L. E. Workman and Karl Paine, for Appellant.

The court erred in giving the following instruction: The court instructs the jury that although the information alleges that John Doe, whose true name to C. M. Hays, district attorney, was unknown at the filing of said information, was killed and murdered at the time and in the manner alleged in said information, yet if the evidence shows that the name of the deceased was John L. Decker, you will find, if the evidence warrants it, the defendant guilty of murder, of the said John Doe. If the name of the deceased is unknown to the grand jurors, it may be so alleged in the indictment. (2 Bishop's Criminal Procedure, 512 et seq.; 2 Hawkins' Pleas of the Crown, c. 23, sec.

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78; *Reed v. State*, 16 Ark. 502; *Humbard v. State*, 21 Tex. App. 200, 17 S. W. 126; *State v. Cawan*, 18 Mo. 320; *Neiderluck v. State*, 21 Tex. App. 320, 17 S. W. 467; *Parchman v. State*, 2 Tex. App. 228, 28 Am. Rep. 435; 1 Wharton on Criminal Law, 57.)

R. E. McFarland, attorney general, and E. J. Dockery, for the State.

The defendant and his counsel made affidavits setting up their inability to secure certain material witnesses for the trial, and set forth at length what such witnesses would testify. The district attorney admitted that if the witnesses were present they would swear to the statements set forth in the affidavits. The court, accordingly and very properly, denied the application for a continuance. (Rev. Stats., sec. 4372; *Territory v. Guthrie*, ? Idaho, 432, 17 Pac. 39.) Sections 7768 and 7769 of the Revised Statutes provide the manner of applying for a change of venue on account of popular excitement against the accused. (Rev. Stats., sec. 7770.) Under this latter section, a discretion is reposed in the trial court in the matter of granting or denying an application for a change of venue. (*People v. Mahoney*, 18 Cal. 181, 182; *People v. McAuley*, 1 Cal. 379, 383, 384; *People v. Graham*, 21 Cal. 261, 265; *People v. Congleton*, 44 Cal. 92, 94.) The name of the deceased was given as unknown in the information in this case, and counsel for appellant lay much stress upon the omission to prove his name as unknown, and on the refusal of the court to instruct the jury that such omission warranted an acquittal. The old common-law rule, which too often resulted in a failure of justice, has been modified by statute in this state in the matter of proof of the name of deceased. (Rev. Stats., sec. 7683; *People v. Potter*, 35 Cal. 110, 112, 113; *People v. Dick*, 37 Cal. 277; *People v. King*, 27 Cal. 510, 87 Am. Dec. 95.)

HUSTON, J.—The defendant was convicted of murder in the first degree, and sentenced to be hanged. From the judgment and sentence he appeals. Defendant assigns five errors, upon which he asks a reversal of the judgment of the district court:

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First, in the denial of the defendant's application for a continuance of the trial over the term. Defendant's application was based solely upon his own affidavit, setting forth what he would prove by certain witnesses whom he named in said affidavit, and whose attendance he therein stated he was unable to procure at that time. The district attorney thereupon admitted that, if said witnesses were present, they would each and every one of them testify as set forth in defendant's affidavit; and thereupon the court overruled the defendant's motion for a continuance. We find no error in this action of the district court. The granting of a continuance of a trial is a matter of discretion with the trial court, and its action therein will not be disturbed, where the record shows no abuse of such discretion. (*Territory v. Guthrie*, 2 Idaho, 432, 17 Pac. 39.)

The second error assigned by defendant is as to the action of the district court in overruling the defendant's motion for a change of venue. Section 7770 of the Revised Statutes of Idaho, provides: "If the court is satisfied that the representation of the defendant is true, an order must be made for the removal of the action to the proper court of a county free from a like objection." In this case the application was based upon the affidavit of the defendant, unsupported and uncorroborated by other evidence. There was no error in refusing the application for a change of venue. The matter called for the exercise of judicial discretion on the part of the trial court, and we are satisfied that such discretion was properly exercised. (*People v. Graham*, 21 Cal. 261; *People v. Congleton*, 44 Cal. 92.)

The third error assigned is in the refusal of the court to give certain instructions asked by defendant. These instructions are to the effect that the information having given the name of the victim of the homicide as John Doe, "whose true name is unknown to the district attorney," and the evidence having shown the name of deceased to have been John L. Decker, such variance was fatal to the finding of a verdict of guilty. This contention is not correct. Section 7683 of the Revised Statutes is as follows: "When an offense involves the commission of or an attempt to commit a private injury, and is described with suffi-

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cient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured is not material." The cases cited by defendant's counsel in support of his contention arose in states which do not appear to have any statute similar to our section 7683, and where the rule of the common law obtains. In California, from which state our statute was taken, it has been uniformly held that such a variance is immaterial. (*People v. Potter*, 35 Cal. 110; *People v. Dick*, 37 Cal. 277; *People v. King*, 27 Cal. 507, 87 Am. Dec. 95.)

The fourth assignment of error involves the question considered in the third assignment.

The fifth assignment of error claims, in substance, that it is justly and fairly inferable from the acts of the defendant subsequent to the homicide that he was insane. The record does not show any direct evidence upon the question of the insanity of the defendant. In fact, that matter does not appear to have been alluded to, except by the witness Dr. Beers, who visited the defendant after his arrest, and after he had been on a debauch for several days, between the time of the committing of the homicide and the time of his arrest, who states that when he saw the defendant, at the time stated, he appeared to be "a mental, physical wreck." For the court to infer from this statement of a single witness that the defendant, at the time he committed the atrocious crime detailed in the record in this case, was in such a mental condition as to relieve him from criminal responsibility, would be enlarging the beneficence of the law to an extent which would render the promotion of justice in the administration of the law an unknown quantity. Chapter 6, title 10, of the Revised Statutes, provides the manner in which the issue of the insanity of a defendant indicted for crime shall be tried, and this statute does not seem to have been invoked, or attempted to be; and yet the court, out of the abundance of its charity, and its recognition of the rule in *favorem vite*, gave this instruction to the jury: "If you find that the defendant, at the time of committing the crime charged, was so mentally afflicted as to be unable to comprehend the import and consequence of his own acts, and could not at such time

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distinguish between right and wrong, and, further, if you find that mental condition was not caused by defendant himself for the purpose of committing a crime, and relieving himself of the consequences of his unlawful act, you should acquit him."

A careful and thorough inspection of the record fails to disclose any error to the prejudice of the defendant. The judgment of the district court is affirmed, and the cause remanded for further proceedings according to law.

Sullivan, C. J., and Quarles, J., concur.

(May 13, 1898.)

STATE EX REL. CHEMUNG MINING COMPANY v. CUNNINGHAM, ADMINISTRATOR.

[53 Pac. 451.]

SALE OF REAL ESTATE BY ADMINISTRATOR.—Under the provisions of section 5491 of the Revised Statutes, all sales made by an administrator of the estate of a deceased person must be reported under oath to, and confirmed by, the probate court before the title of the property sold passes.

SAME—RETURN OF SALE—CONFIRMATION BY THE COURT.—No title passes until return of sale is made under oath and confirmed by the court, nor can the administrator legally convey the title until such report and confirmation are made.

ADMINISTRATOR MUST EXECUTE CONVEYANCE—MANDAMUS WILL LIE TO COMPEL.—It is the official duty of an administrator, enjoined by statute, to execute a conveyance of real estate after return of sale has been made, as required by law, and confirmed by the court, and to execute a conveyance therefor as directed by the order of confirmation. In cases of refusal, *mandamus* will issue to compel him to act.

(Syllabus by the court.)

APPEAL from District Court, Shoshone County.

John R. McBride, for Appellant.

The writ of *mandamus* does not lie in any case where a doubt arises as to the duty of the person sought to be made to perform.

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It lies in a case free of doubt and when there is no other remedy. (*Harpending v. Haight*, 39 Cal. 189, 2 Am. Rep. 432; *Fulton v. Hanna*, 40 Cal. 278; *People v. Supervisors*, 28 Cal. 429; *Williams v. Smith*, 6 Cal. 91; *Goodwin v. Glazer*, 10 Cal. 33; *Fogarty v. Sparks*, 22 Cal. 143; *People v. Olds*, 3 Cal. 167, 58 Am. Dec. 398; *Middleton v. Low*, 30 Cal. 596; *Hewill v. Lane*, 53 Cal. 213.) The court will refuse the writ, if, upon granting it the object could not be accomplished. (*People v. Tremain*, 17 How. Pr. 142; *People v. Supervisors*, 21 How. Pr. 335; affirmed in 22 How. Pr. 276.) The petitioner had a complete remedy by an appeal from the decree of the probate court, entered July 26, 1897, affirming the sale to Hanly. (Idaho Rev. Stats., sec. 4831.) In *Grignon v. Astor*, 2 How. (U. S.) 319, it was held that if the court—the probate court—had jurisdiction over the subject, errors and irregularities in the procedure were the subject of correction by appeal only. (*Comstock v. Crawford*, 3 Wall. 402.)

A. G. Kerns, for Respondent.

An objection to the sufficiency or form of the petition and affidavit should have been taken by motion or demurrer, where the defect, if any, might have been remedied by amendment. Objections to the form of action brought cannot be taken for the first time on appeal; unless taken on the trial they are considered waived. (*People v. McLean*, 80 N. Y. 254.) Or that the suit should have been brought in equity instead of at law. (8 Ency. of Pl. & Pr. 177.) The act of the probate judge, assuming to act as the probate court, in deliberately changing the name of the purchaser in whom the sale was orally announced by the court to have been confirmed, was an excess of jurisdiction and void. (2. Lawson's Rights, Remedies and Practice, sec. 953, and cases cited.) A defense in *mandamus* proceeding must exist in favor of the defendant. He cannot set up pretended rights existing in strangers based upon his own illegal and void actions, by way of defense. (Merrill on Mandamus, secs. 53, 54, 55 et seq.; p. 59; *Williams v. Clayton*, 6 Utah, 86, 21 Pac. 398; *People v. Mayor of New York*, 10 Wend. 393-397; *People v. Fleming*, 4 Denio, 137, 2 N. Y. 484.) An action for

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damages for failure to perform a ministerial duty is not an adequate remedy in law. (High on Extraordinary Legal Remedies, 35; Merrill on Mandamus, sec. 53; *Fremont v. Crippen*, 10 Cal. 212, 70 Am. Dec. 711; *Adrianse v. Supervisors of New York*, 12 How. Pr. 224; *Buck v. City of Lockport*, 6 Lans. 251, 43 How. Pr. 361; Merrill on Mandamus, secs. 85, 86; High on Extraordinary Legal Remedies, sec. 96; *State v. Le Fevre*, 25 Neb. 223, 41 N. W. 184; *Moore v. Muse*, 47 Tex. 214.) A want of jurisdiction in a court rendering a judgment may be shown collaterally whenever any benefit or protection is sought under the judgment. (1 Black on Judgments, secs. 170, 218, 250, 275, 633; *Putnam v. Man*, 3 Wend. 202, 20 Am. Dec. 686; *Fitzhugh v. Custer*, 4 Tex. 391, 51 Am. Dec. 728; *Thoureine v. Rodrigues*, 24 Tex. 468; *Hill v. City Cab Co.*, 79 Cal. 188, 21 Pac. 728; *Tyson v. Belcher*, 102 N. C. 112, 9 S. E. 634.)

SULLIVAN, C. J.—This is a proceeding brought in the district court for a writ of mandate to compel the defendant, Cunningham, as administrator, to execute a conveyance of an undivided one-third interest in a certain mining claim situated in Shoshone county. The facts are as follows: Clarence Cunningham, as administrator of the estate of David McKelvey, deceased, made application to the probate court of Shoshone county for an order to sell an undivided one-third interest of the Skookum lode mining claim. On said application an order of sale was granted, and the administrator caused notice to be posted and published for bids for the sale of said property, as required by the order of sale, and received but one bid thereunder for said property. Said bid or offer was made by the Chemung Mining Company, and the price offered was \$700, that being the only bid received under said notice. The said administrator made his return of sale to the said probate court, wherein he reports, *inter alia*, as follows: "I did on said day sell said real estate to the Chemung Mining Company, the purchaser thereof, and request that said sale be confirmed." Said return is dated June 15, 1897. Said sale was confirmed by said court on the thirteenth day of August, 1897. It appears from the transcript that an order confirming a sale of said real estate was made on the twenty-sixth day of July, 1897. Said order

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recites the facts of said return having been made, and of the sale of said real estate to Kennedy J. Hanly for the sum of \$700, instead of to the Chemung Mining Company, as actually shown by said return. There is sufficient in the record to show why that change was made. The return of the administrator showed that the only offer or bid received at said sale was one from the Chemung Mining Company, and the court was induced to believe that said Kennedy J. Hanly, who was one of the directors of said corporation, was the proper person to take the title to said real estate, and for that reason confirmed the sale and ordered the conveyance to be made to him; whereupon said administrator executed a conveyance to said Hanly. Thereafter said court set aside said last-mentioned order, and confirmed said sale to the Chemung Mining Company, and directed said administrator to convey a one-third interest in and to said Skookum mining claim to said company, which order said administrator refused to obey. Thereupon application was made to the judge of the district court in and for said Shoshone county for a writ of mandate to compel said administrator to convey said real estate to the Chemung Mining Company as directed by said last-mentioned order of the probate court. Said administrator answered the application or petition for said writ by setting forth the facts substantially as above set forth, and stating that under the order confirming the sale to Hanly he had received the purchase price from him, and executed a deed conveying to him the undivided one-third interest in and to said mining claim: and the matter was heard, and peremptory writ granted, whereby said administrator was required to convey said undivided one-third interest in and to said Skookum lode mining claim to said Chemung Mining Company. This appeal is from the judgment of the court granting said writ.

It is contended that the plaintiff or petitioner had a plain, speedy and adequate remedy at law by appeal from the order confirming the sale to Hanly. In answer to that contention it is sufficient to say that the probate court set aside said order confirming the sale to Hanly on the thirteenth day of August, 1897, and entered an order confirming the sale to the Chemung Mining Company; and, further, that the order confirming the

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sale to Hanly was absolutely void, for the reason that the sale to Hanly was not reported "under oath" to said court, as required by the provisions of section 5491 of the Revised Statutes nor was it reported at all in writing to said probate court. The administrator is required to make a return of his proceedings of any sale of real estate, which return must be filed in the office of the clerk of said court. Section 5491 of the Revised Statutes, is as follows: "No sale of any property of an estate of a decedent is valid, unless made under order of the probate court, except as otherwise provided in this chapter. All sales must be reported under oath and confirmed by the probate court before the title to the property sold passes." There was no return of a sale to Hanly, and the order confirming a sale to him was void. Said section 5491 of the Revised Statutes is mandatory, and until a sale is reported under oath the court has no basis for an order confirming a sale. No title can pass until at least two steps are taken, to wit, a return of sale made under oath, and its confirmation by the court. No title passed to Hanly by the conveyance executed by Cunningham, as administrator, to him. It was the official duty of said administrator, enjoined by statute, to execute a conveyance to said mining claim to the Chemung Mining Company, as directed by said order confirming the sale; and, as he refused to do so, said company was entitled to a writ of mandate, upon a proper showing, to compel him to perform his duty in that regard, as no other plain, speedy and adequate remedy is provided for such cases. The judgment appealed from is affirmed, and costs of this appeal are awarded to the respondent.

Huston and Quarles, JJ., concur.

ON REHEARING.

(June 13, 1898.)

HUSTON, J.—In filing petitions for rehearing the counsel are too often unmindful of or overlook the fact that this court in its investigation is of necessity confined to the record. If the record is incorrect, or fails to truly and fully present the facts, there are methods provided by our rules for its correc-

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tion. But upon the record as presented we are compelled to predicate our conclusions. The petition in this case contains the following: "1. The court was misled as to a matter of fact to which it is quite clear it attached great significance, viz.: in that part of the decision which assumes that Hanly in some way imposed upon the probate court, and induced the judge thereof to believe that his bid was identical with that of the Chemung Mining Company, and by relying upon the further fact that Hanly was an officer of the Chemung Mining Company"; and counsel adds, "This state of the facts is not true, nor is there any proof of it." The record, presumably prepared by, or under the direction of, counsel himself, contains the following statement as in the record of the probate court (Trans., p. 5, fol. 16): "And it appearing to the satisfaction of the court that such order confirming said sale in Kennedy J. Hanly was obtained by misrepresentation and fraud upon the part of the said Kennedy J. Hanly in pretending to represent the said Chemung Mining Company." And this statement of the probate judge is nowhere disputed in the record and is first called in question by the petition for a rehearing. Now, which of these two statements, so palpably in conflict, are we to accept as the basis of our conclusions? "A question not to be asked." Counsel, in his petition, says this statement of the probate judge "was not proven." But we are told by counsel that the decrees of the probate court import verity. Certainly, then, the undisputed official statement of the probate court in its order confirming the sale, and which appears in the record presented by counsel himself to this court, and the correctness of which he is presumed to vouch for, and to which alone we are confined for our knowledge of the facts in the case, and which the district court has found to be correct and has made the basis of its judgment, are not to be overturned or set aside upon the bare statement of counsel in his petition for a rehearing. But counsel contends that respondent had a "speedy and adequate remedy at law" by appeal. Appeal from what? The order of the probate court confirming the sale in Hanly? That order had been set aside by the probate court upon the ground that it had been procured by the misrepresentations and fraud of Hanly;

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and the probate court, recognizing probably a rule which counsel for petitioner seems to overlook, that "fraud vitiates everything." made an order confirming the sale in the party who it is admitted was the party to whom the sale had been made, and and who was the highest and only bidder at the sale, and the sale to whom had been confirmed by the probate court, but who was deprived of the fruits of his purchase, to wit, a deed of conveyance from the administrator, by the fraudulent misrepresentation of Hanly that he was himself the purchaser—the Chemung Mining Company incarnate. It seems to us under the conditions shown by the record, the only appeal respondent could have desired was from the refusal of the administrator to execute the conveyance in accordance with the order of the probate court, as it was in this refusal only that he was aggrieved. And his only "speedy and adequate remedy" was in a writ of mandate to compel the administrator to execute the conveyance that he was entitled to, and that he obtained; and from the case as presented to us in the record we think the action of the district court in granting such writ was correct. Counsel's contention that by the action of the probate court on the 26th of July the matter became *res adjudicata* is not maintainable, either upon principle or authority. The right "to amend and control its process and orders so as to make them conformable to law and justice" is expressly given to every court by the provisions of subdivision 8 of section 3862 of the Revised Statutes of Idaho, and this power was exercised by the probate court in proper time. Rehearing denied.

Sullivan, C. J., and Quarles, J., concur.

Argument for Appellant.

(May 13, 1898.)

FELLAND v. VOLLMER MILLING AND MERCANTILE
COMPANY.

[53 Pac. 268.]

CHATTEL MORTGAGE—DEED TO REAL ESTATE—FORECLOSURE.—The V. M. & M. Co., holding a chattel mortgage upon certain personal property of the firm of F. E. & Son, and also a mortgage upon real property of the firm, both of which were given to secure indebtedness due and owing from said F. E. & Son to said V. M. & M. Co., on default, foreclosed the chattel mortgage, F. E. & Son giving a deed to V. M. & M. Co. of the real estate, and thereupon the V. M. & M. Co. executed to said firm of F. E. & Son an agreement in writing conditioned that said V. M. & M. Co. would convey to said F. E. & Son, or either of them, the said personal property, consisting of a sawmill and belongings, and said real estate, if the said firm, or either of them, would pay to said V. M. & M. Co. the amount due said company from said firm at any time within a period of eight months. *Held*, such agreement did not constitute the deed a mortgage.

FRAUD.—The evidence in this case examined and held not to establish fraud.

(Syllabus by the court.)

APPEAL from District Court, Latah County.

Sweet & Steele, for Appellant.

Testimony shows the deed to have been a mortgage. If the paper can be permitted to stand at all, and as we have not asked its cancellation, we suppose it must stand. If a partner attempts to defraud his copartner, and any other person conspires with him in that attempt, then anything they may accomplish is void, as the law does not permit a third person to conspire with a partner against a copartner. (Parsons on Partnership, 3d ed., pp. 177, 178, note i, beginning p. 112, 113, 178.) It makes no difference that the fraudulent transaction is consummated at a public sale. (Bump on Fraudulent Conveyances, 261-266.) The first point to which we direct the attention of the court is, that the purchase price was an antecedent debt. That the defeasance stated that upon the repayment to respondent of the purchase price, which was an antecedent

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debt, the property should be transferred back. (*Montgomery v. Spect*, 55 Cal. 352; *Sandfoss v. Jones*, 35 Cal. 481; *Kelley v. Leachman*, 3 Idaho, 392, 29 Pac. 849; *Russell v. Southard*, 12 How. 139; 5 Meyer's Fed. Dec. 121.)

Forney, Smith & Moore, for Respondents.

If all the allegations of the complaint charging fraud are true, they are insufficient to constitute fraud upon Felland. (Cooley on Torts, 474; 1 Story's Equity, 186, 187; Kerr on Fraud and Mistake, 1, 2; 2 Pomeroy's Equity Jurisprudence, secs. 872-876.) The allegations of the complaint charging fraud are unsupported by the evidence. The deed to the forty acres of land is not a mortgage. (*Vance v. Anderson*, 113 Cal. 532, 45 Pac. 816; Jones on Mortgages, secs. 256-282; Devlin on Deeds, sec. 1115; 3 Pomeroy's Equity Jurisprudence, sec. 1196; *Henly v. Hotaling*, 41 Cal. 22; *People v. Irwin*, 14 Cal. 428; *Cornell v. Hall*, 22 Mich. 377; *Smith v. Crosby*, 47 Wis. 160, 2 N. W. 104; *Voss v. Eiler*, 109 Ind. 260, 10 N. E. 74; *Montgomery v. Spect*, 55 Cal. 352; *Horbach v. Hill*, 112 U. S. 144, 5 Sup. Ct. Rep. 81; *Conway etc. v. Alexander*, 7 Cranch, 218; *Winters v. Swift*, 2 Idaho, 61, 3 Pac. 15.) Where there is a substantial conflict in the testimony the judgment of the lower court will not be disturbed. (*Sabin v. Burke*, 4 Idaho, 28, 37 Pac. 352.) The question, whether or not a deed absolute on its face is a mortgage depends entirely upon the intention of the parties to the transaction. This intention can only be determined from their conduct and expression of intention and it leaves the matter in each case almost wholly and entirely a question of fact. There are no set rules of law that will control in every case, but one of the strongest evidences of the intention of the parties is whether or not the relation of debtor and creditor exists between grantor and grantee with reference to the consideration of the conveyance. (Jones on Mortgages, sec. 269; *Winters v. Swift*, 2 Idaho, 61, 3 Pac. 15; *Vance v. Anderson*, 113 Cal. 532, 45 Pac. 816, and cases cited; Devlin on Deeds, 1115; 3 Pomeroy's Equity Jurisprudence, sec. 1196; *Cornell v. Hall*, 22 Mich. 377; *Horbach v. Hill*, 112 U. S. 144, 5 Sup. Ct. Rep. 81 (this opinion is by Justice Field); *Conway v. Alexander*, 7 Cranch, 18 (this opinion is by Chief Justice Marshall).

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HUSTON, J.—This is an action brought for an accounting, for the setting aside of a sale under a chattel mortgage, and for declaring a deed absolute upon its face to be a mortgage. The facts, as alleged in the complaint, are substantially as follows: In the month of March, 1891, plaintiff and two of the defendants, Ole Edwardson and Ole O. Edwardson, entered into a copartnership, for the purpose of engaging in the business of manufacturing lumber and doing a general sawmilling business, under the firm name and style of Felland, Edwardson & Son. In the course of their business, and between said month of March, 1891, and the third day of March, 1894, said firm had become indebted to the defendants the Vollmer Milling and Mercantile Company in the amount of \$2,500, which indebtedness was evidenced by divers promissory notes executed by said firm to the said Vollmer Milling and Mercantile Company, which notes were secured by a chattel mortgage executed by said firm to said Vollmer Milling and Mercantile Company upon certain personal property described in the complaint. That all of said notes secured by said mortgage became and were due long prior to March 3, 1894. Said notes were further secured by a mortgage upon real estate described in the complaint, executed by said firm, or the members thereof. That all of said notes so secured became and were due long prior to March 3, 1894. The complaint alleges the property covered by the chattel mortgage to be of the value of \$6,000, and that the real estate is of the value of \$2,000. The complaint further alleges that some time prior to March 3, 1894, the said Vollmer Milling and Mercantile Company entered into an agreement with Ole Edwardson, one of the defendants, and a member of said firm of Felland, Edwardson & Son, by which it was agreed that the said mortgagee should, for the purpose of cheating and defrauding the plaintiff, foreclose said chattel mortgage, and at the sale thereunder bid in the property covered thereby for the use and benefit of said Ole Edwardson. The complaint further alleges that it was also agreed between said parties that unless the firm of Felland, Edwardson & Son should deed the property described in the real estate mortgage to the Vollmer Milling and Mercantile Company, the said real estate mortgage

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would also be foreclosed, and that said property should be purchased by said corporation for the sole use and benefit of the said Ole Edwardson; it being a part of the said agreement that as soon as the said corporation should realize enough money out of the use of said property and proceeds of the business to pay the indebtedness due from said firm to said corporation, or as soon as said debt should be paid by said Ole Edwardson, all the said property should be transferred to the said Ole Edwardson, and that the said Vollmer Milling and Mercantile Company should take possession of said property, and conduct and manage the business of manufacturing saw logs into lumber, and should account to said Ole Edwardson for the proceeds derived therefrom, until such time as the indebtedness should be paid. The complaint proceeds to state that a sale of the property included in the chattel mortgage was had. It is not pretended but the sale was regularly and legally conducted, but the plaintiff avers that "said sheriff's sale was conceived in fraud, and that it was not made in good faith, and that, while regular upon its face, it was used, and was intended to be used, by said Vollmer Milling and Mercantile Company and said Ole Edwardson as a means through which to cheat, defraud and deprive plaintiff of his interest in said business and said property, etc." Not a single fact or circumstance is stated that tends in the slightest degree to establish fraud. Something more is required, we apprehend, in a pleading intended to establish or set forth a fraudulent transaction, and seeking relief therefrom, than a mere reiteration of the words "cheat, wrong and defraud." The complaint shows a *bona fide* indebtedness due and owing from the firm of Felland, Edwardson & Son to the Vollmer Milling and Mercantile Company; that the same was secured by a chattel mortgage and a real estate mortgage. The chattel mortgage was regularly, properly and legally foreclosed after default made. No fraudulent acts on the part of the mortgagee are shown, or attempted to be shown. The plaintiff says the sale was "conceived in fraud," but there is no statement that such alleged fraudulent conception ever culminated in a birth, to the injury, damage or deception of plaintiff. Conceding that the mortgagee had agreed, after the sale under the chattel mort-

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gage, that he would convey the mortgaged property to Edwardson, either for a consideration or without consideration, wherein is the plaintiff defrauded thereby? After the sale the property became the property of the purchaser, and, whether that purchaser was the mortgagee or another, he had the right to dispose of it (there being no right of redemption) to whomsoever he saw fit, and upon such terms as he pleased.

It further appears from the complaint that, as an additional security for the sum owing from the firm of Felland, Edwardson & Son to the Vollmer Milling and Mercantile Company, the firm had assigned to said Vollmer Milling and Mercantile Company certain notes and accounts, the property of said firm. By an order of the court this matter was submitted to a referee, who reported to the court that the sum of \$601.79 had been collected by the Vollmer Milling and Mercantile Company upon said notes and accounts, which sum was credited upon the indebtedness of said firm to said Vollmer Milling and Mercantile Company. It is also alleged in the complaint that after the sale under the chattel mortgage the Vollmer Milling and Mercantile Company, mortgagee in the real estate mortgage referred to as executed to them by the said firm, threatened to foreclose the same, and by means of said threats induced the members of said firm to convey to said mortgagees, by deed, the real estate described in said mortgage; said Vollmer Milling and Mercantile Company, at the time of the execution of such deed, giving to said firm an instrument in the following words, viz.:

“Vollmer, Idaho, March, 1894.

“This is to certify that we do hereby agree to sell to and give to Felland, Edwardson & Son, or either of them, a warranty deed to lot four (4), section three (3), township thirty-nine (39) north, range 3, W. B. M., any time within eight (8) months from date; provided, we are at that time in possession of said lot of land; and provided, further, that said Felland, Edwardson & Son, or either of them, shall pay or cause to be paid to us the amount of money that shall at that time be due us by the said Felland, Edwardson & Son on notes and accounts, together with the purchase price of the above-described land,

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and the sawmill located on same; purchase price amounting to \$1,525.00.

**"THE VOLLMER MILLING AND MERCANTILE
COMPANY,**

**"By OSCAR LARSON,
"Sect. & Treas."**

This paper would seem to be a direct negation of the whole theory of the plaintiff, that a conspiracy was entered into between the Vollmer Milling and Mercantile Company and Edwardson to defraud him. The plaintiff has the same option of purchase, and upon the same terms, under this instrument, that his partners, or either of them, have. It was given with full knowledge of its contents by all the members of said firm, and would appear to have been acquiesced in by them all. It was given after the title to both the real and personal property mortgaged had vested in the Vollmer Milling and Mercantile Company. Such action by the Vollmer Milling and Mercantile Company at this time seems hardly consistent with the theory that they were seeking to "cheat, wrong and defraud the plaintiff for the benefit of Edwardson," It appears, moreover, that, at the sale under the chattel mortgage, Edwardson had procured the attendance of a friend, John Oleson, who, it is shown, was a man of almost unlimited means, and who, as he states himself, attended said sale to look after and protect the interests of his friend Edwardson; yet said Oleson declined to bid more than \$725 for property which it is claimed by the plaintiff was worth at the time \$6,000. On the seventh day of July, 1894, the plaintiff sold and transferred to his copartners, Ole Edwardson and Ole O. Edwardson, all his interest in said firm, and in the property of said firm, except one-half interest in such of the notes and accounts theretofore assigned by said firm to the Vollmer Milling and Mercantile Company as should remain in the hands of said Vollmer Milling and Mercantile Company after the indebtedness of said firm to them had been paid, which sale and transfer were evidenced by an agreement, in writing, duly executed by all of the members of said firm, and which declared said copartnership dissolved. The position of

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the plaintiff is somewhat unique. He claims that he has been "cheated, wronged and defrauded" by the acts of his copartner, in conspiracy with the defendant the Vollmer Milling and Mercantile Company, by which he has been induced to part with valuable property and interests; and he brings suit to effect a purpose which, if consummated, would benefit his alleged fraudulent copartner equally with himself. It would not be an easy matter to adjust the equities in this case, if equities there were; but we have earnestly and laboriously examined the record in this case, and we are unable to find a hook whereon to hang an equity. There is much testimony as to conversations between the parties, and between other persons, and certain of the parties to the suit; but, to our mind, there is an utter failure to establish any such agreement between Edwardson and the Vollmer Milling and Mercantile Company as is set forth in the complaint. The very most that is shown by the evidence is a desire on the part of the Vollmer Milling and Mercantile Company to befriend their debtors in so far as that can be done without jeopardizing their own interests. The claim of plaintiff that the mortgaged property was sold for a sum greatly less than its actual value is not borne out by the evidence. By none of the definitions which we have been able to find can fraud be predicated upon the facts shown or attempted to be shown by the record in this case. (Cooley on Torts, 2d ed., sec. 473 et seq.; Kerr on Fraud and Mistake, sec. 1; 2 Pomeroy's Equity Jurisprudence, sec. 873 et seq.)

Plaintiff contends that the deed executed by himself and his copartners to the Vollmer Milling and Mercantile Company on the 8th of March, 1894, is, by reason of the agreement of the same date executed by the Vollmer Milling and Mercantile Company to them, a mortgage. We cannot agree with this contention. The agreement was for the conveyance, not only of the real estate deeded, but of the personal property purchased by the Vollmer Milling and Mercantile Company at the sale under the chattel mortgage, upon the payment by the said firm, or either of them, within eight months, of the amount at that time due from the firm to said Vollmer Milling and Mercantile Company. It is not claimed or pretended that any payment or tender of

Points decided.

payment of the indebtedness due from the firm of Felland, Edwardson & Son, or any part of it, has ever been made; and it would seem that the plaintiff now claims that the Vollmer Milling and Mercantile Company should account to the plaintiff for the proceeds of said mill property from the time said Vollmer Milling and Mercantile Company went into possession under the foreclosure of the chattel mortgage, and should further pay over to plaintiff any excess shown by such accounting over and above the amount of the indebtedness due from said firm to said Vollmer Milling and Mercantile Company. We know of no principle of equity upon which such a claim can be based. The plaintiff claims that he must be allowed to redeem the personal property sold under the chattel mortgage, as well as the real estate deeded, because he says the deed of the real estate was given and intended to operate as a mortgage. If this latter proposition were correct—which it is not—the recognition of the plaintiff's claim would involve such a vicarious prolongation of the principles of equity as we can find no authority for. Under none of the authorities we have been able to find can the deed in this case be held to be a mortgage. It seems to us that the findings of the court below in this case are fully supported by the evidence. The judgment of the district court is affirmed, with costs to respondents.

Sullivan, C. J., and Quarles, J., concur.

(May 24, 1898.)

HOLLAND BANK v. LIEUALLLEN.

[53 Pac. 398.]

SETTING ASIDE DEFAULT—WHAT MUST BE SHOWN—DISCRETION OF TRIAL COURT.—The discretion of the trial court in refusing to set aside a default judgment will not be disturbed unless it is shown that such discretion has been abused. An application by the defendant to set aside a default judgment after the term at which such judgment was rendered must be supported by evidence showing mistake, inadvertence, surprise or excusable neglect on his part, and accompanied by an affidavit of merits showing facts which constitute a defense to the plaintiff's action.

(Syllabus by the court.)

Argument for Respondent.

APPEAL from District Court, Latah County.

George W. Goode, for Appellant.

The best rule seems to be that the trial court should always exercise its discretion in favor of setting aside a default when the application is made in good faith and any reasonable showing is made. (*Dougherty v. Nevada Bank*, 68 Cal. 276, 9 Pac. 112; 5 Am. & Eng. Ency. of Law, 496, 58 et seq.; *Buell v. Emerich*, 35 Cal. 116; *Anaconda Min. Co. v. Saile*, 16 Mont. 8, 50 Am. St. Rep. 472, 39 Pac. 909.) It is true that the matter rests within the sound discretion of the trial court, but this is not an arbitrary or biased discretion, and in case the trial court abuses this discretion its decision will be reviewed by the appellate courts. (5 Am. & Eng. Ency. of Law, par. 62, note 6; *Watson v. San Francisco etc. R. R. Co.*, 41 Cal. 20; *Vermont Marble Co. v. Black* (Cal.), 38 Pac. 512; *Broadbent v. Brumback*, 2 Idaho, 366, 16 Pac. 555.)

Forney, Smith & Moore, for Respondent.

The allowance of \$250 as attorney's fees is stipulated in the contract and is secured by the terms of the mortgage, the same as any other part of the indebtedness. At the hearing of this cause evidence was introduced on the part of the plaintiff and upon this evidence judgment was rendered. The presumption is that courts do their duty; that they follow the law; that their decisions are correct. Error must affirmatively appear. (*Hastings v. Cunningham*, 35 Cal. 550; Hayne on New Trial and Appeal, sec. 285, cases.) It will be observed that while appellants relied upon "excusable neglect" as ground for setting aside the judgment, there was no showing of his defense. He simply says he has talked with an attorney, and had "fully and fairly stated all the facts of the case, etc." But the better rule is that he shall show his defense. (*Bailey v. Taffe*, 29 Cal. 423 (426); 6 Ency. of Pl. & Pr., 183, 184; 5 Ency. of Pl. & Pr., 1024, note and citation 3, extending to bottom of p. 1025; *Schofield v. Horse Spring Cattle Co.*, 65 Fed. 433; *Goodhus v. Churchman*, 1 Barb. Ch. (N. Y.) 596.) The record in this case, we submit, shows no case of excusable neglect; neither

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does it show any abuse of discretion on the part of the lower court in refusing to set aside the default. But, as we stated before, error must affirmatively appear. On the point of setting aside a judgment after sale of the lands, see *Foster v. Hauswirth*, 5 Mont. 566, 6 Pac. 19. On discretionary power in refusing the relief sought herein, see *Robert E. Lee S. M. Co. v. Englebach*, 18 Colo. 106, 31 Pac. 771; *Lovejoy v. Willamette Transp. etc. Co.*, 24 Or. 569, 34 Pac. 660; *Livesley v. O'Brien*, 6 Wash. 553, 34 Pac. 134.

QUARLES, J.—Plaintiff brought its suit to foreclose a mortgage. Summons was duly issued and served. After the time for answering had expired, the default of the defendants was entered, and judgment of foreclosure entered in conformity to the prayer of the complaint. After the expiration of the term of court at which the judgment was rendered, the defendants applied to the court for an order setting aside the default and judgment. In support of the application, the affidavit of the defendant, A. A. Lieuallen was filed to the effect that, after the service of summons, he saw one of the attorneys for the plaintiff, and requested that the cause be not placed upon the calendar at the succeeding term of court, commencing May 17, 1897, and that the cause be continued until the fall term of court, without defendants waiving any of their rights; that to said request he was told by said attorney to see Mr. Reed, the agent for the plaintiff; that said Reed suggested that things stand awhile, and he would communicate with the office at Spokane, and would let the defendant know if he would agree to a continuance; that after this affiant called at the office of said Reed several times, but failed to see said Reed; that affiant neglected to file answer for himself and wife within the time required by the summons, while waiting to hear from said Reed, who failed to inform affiant; that by examination at the opening of the May term of court affiant ascertained that no default had been entered, and that the cause was not on the calendar, from which affiant concluded that plaintiff had agreed to carry the cause over till the fall term of court, for which reason the affiant gave no further attention to the cause at the said May term of said

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court; that about the 20th of October, 1897, affiant first learned that said cause had been placed on the calendar at the May term, default entered, and judgment therein entered on the sixteenth day of June, 1897; that affiant has fully and fairly stated all the facts of the case in said cause to his counsel, George W. Goode, an attorney at law residing at Moscow, Idaho, and after such statement is by him advised that he and his wife have a good and substantial defense to said action on the merits, and verily believe the same to be true. Plaintiff filed the counter-affidavit of Theodore Reed in opposition to said application, in which said Reed corroborates defendant's affidavit in some respects, and contradicts it in others. Said Reed deposed that he told the defendant that he had no authority to agree to a continuance of the cause till the fall term; that he would telephone to the managing agent of plaintiff at Spokane, A. F. Van Hall, to see if said Van Hall would agree to such continuance; that he did telephone, and found that said Van Hall was then on the road between Spokane and New York; that one or two days afterward he saw said Lieuallen, and informed him that he had telephoned to Spokane, and that there was no one there authorized to agree to a continuance.

The defendant did not show good cause for setting aside the judgment and default. No agreement to continue the cause was shown, and no good excuse for not answering prior to entry of default is shown. The setting aside of a default is a matter of discretion, reposed in the trial court, whose action will not be disturbed on appeal, unless there has been an abuse of such discretion. It does not appear in this case that such discretion was abused. As to what should be shown on application to set aside a default judgment after the term at which it is rendered, is matter of practice. Correct practice and the rule in this state to be followed is that, in addition to showing one of the grounds mentioned in section 4429 of the Revised Statutes, the defendant must, in his affidavit of merits, state the facts upon which his defense is based—must set forth the substance of his defense, so that the court may judge for itself whether the alleged defense is frivolous or meritorious. No such showing was made in this case. We are not willing to sanction a rule of practice which substitutes for the judgment of the trial court, as to whether

Argument for Appellant.

the defendant has a meritorious defense or not, the opinion of some attorney whose opinion is based upon *ex parte* statements of an interested party not made under oath. Such practice has prevailed in one or more states, but its recognition here, we think, would be fraught with dangers resulting in vexatious delays, oftentimes without any grounds therefor. The order and judgment appealed from are affirmed. Costs of appeal awarded to respondent.

Sullivan, C. J., and Huston, J., concur.

(May 24, 1898.)

JAECKEL v. PEASE.

[53 Pac. 399.]

FORECLOSURE OF MORTGAGE—MORTGAGE DEBT—PLAINTIFF ENTITLED TO WHAT IS DUE HIM.—If, in a suit to foreclose a mortgage, the courts should decide that plaintiff is not entitled to a foreclosure, yet, nevertheless the plaintiff should have judgment for any portion of the mortgage debt shown by the pleadings and proof to be due him, against the defendants personally liable therefor.

MARRIED WOMAN—COMMUNITY DEBT—CREATED FOR WIFE'S SEPARATE BENEFIT.—A married woman cannot bind herself personally for the debt of her husband, or for a community debt, and it is error to render judgment jointly against the husband and wife on a note signed by both in the absence of a showing that the debt was created for the separate use and benefit of the wife, or for the use and benefit of her separate estate.

(Syllabus by the court.)

APPEAL from District Court, Kootenai County

Charles L. Heitman, for Appellant.

The appellant, Mary A. Pease, contends that no judgment should have been rendered against her upon said promissory note in said suit; citing the case of *Dernham v. Rowley*, decided by the supreme court of the state of Idaho, on the 9th of April, 1896, and reported in 4 Idaho, 753, 44 Pac. 643 (14 Am. & Eng. Ency. of Law, 604-621), in which it is held by this court

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that a married woman has no power in this state to bind herself by a promissory note such as the one described in the complaint herein, unless the debt evidenced thereby was contracted by the wife for the use of her separate property, or for her own use and benefit.

No brief for respondent.

QUARLES, J.—George H. Pease and his wife, Mary A. Pease, executed, October 15, 1891, their certain promissory note for the sum of \$909.35 to Dr. Charles F. Mussigbrod, payable one year after date and executed a mortgage to said payee, on community property occupied by said mortgagors as a residence, to secure the payment of said note. Said Mussigbrod died, and his executors assigned the said note and mortgage to plaintiff, who commenced this action on October 6, 1897, to foreclose the said mortgage. The defense against the foreclosure of said mortgage is based on the idea that the certificate of acknowledgment of the wife to said mortgage does not comply with the statute, and for that reason the mortgage is void. That part of the certificate of acknowledgment to the said mortgage relating to the acknowledgment of the wife is as follows, to wit: "And the said Mary A. Pease, wife of the said George H. Pease, having been by me first made acquainted with the contents of said instrument, acknowledged to me, on examination apart from and without the hearing of her husband, that she executed the same freely and voluntarily without fear or compulsion or undue influence of her husband, and that she does not wish to retract the execution of the same." The trial court held the mortgage void for want of a proper certificate of acknowledgment of the married woman, but gave judgment against Pease and wife jointly on the note, in favor of the plaintiff, for the principal and interest thereof, amounting at the date of judgment to the sum of \$1,753.61 and costs of suit, taxed at \$18, from which judgment the defendant Mary A. Pease appeals and assigns two errors, to wit: 1. That, the suit being an equitable one, and the trial court having decided that plaintiff was not entitled to foreclosure of the mortgage, the court erred in giving the plaintiff judgment for the debt, there being no reformation of the plead-

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ings; 2. That the court erred in rendering judgment against Mrs. Pease, there being no allegation, followed by proof, that the debt was created for her use and benefit, or for the use and benefit of her separate estate.

The first assignment of error cannot be sustained. Under our code if, in a suit to foreclose a mortgage, a foreclosure should be denied, the plaintiff is, nevertheless, entitled to judgment for the amount of the mortgage debt shown by the pleadings and proof to be due him, against the defendants personally liable therefor. We agree with counsel as to the second assignment of error. It was error to render a personal judgment against the wife for a community debt. The wife cannot bind herself personally for the husband's debt, or for the debt of the community. The judgment must be reversed, on account of the error mentioned, but in coming to this conclusion we do not desire to be understood as agreeing with the lower court as to the validity of the certificate of acknowledgment, nor do we desire to be understood as receding from our views in regard to the form of certificate of acknowledgment of a married woman expressed in *Bank v. Rauch*, 5 Idaho, 750, 51 Pac. 764.

The plaintiff has filed no cross-appeal in this cause, nor has he appeared in this court. There is what purports to be a brief on behalf of the respondent on file here, signed by persons who are not attorneys of this court, but the court cannot receive or consider such papers. The judgment appealed from is reversed, and the case remanded to the district court for further proceedings consistent with the views herein expressed. Costs of appeal awarded to appellant.

Sullivan, C. J., and Huston, J., concur.

Argument for Appellant.

(May 24, 1898.)

VERMONT LOAN AND TRUST COMPANY v. MCGREGOR.

[53 Pac. 399.]

JUDGMENT—ASSIGNMENT AND SATISFACTION OF—JURISDICTION.—Plaintiff sued to foreclose a mortgage, and defendant obtained judgment for costs, which judgment defendant assigned to her attorney. By request of attorney for plaintiff, said assignee sent a receipt to a bank in another state with instructions to receive the money for him and deliver the receipt; the plaintiff paid the money to the said bank, took up the receipt and filed it in the action. Plaintiff sued said assignee in said other state to recover a debt alleged to be due it from the said assignee, and garnisheed the money in the hands of the bank. The assignee moved to strike the receipt from the files and that execution issue on the judgment, and the court so ordered. *Held*, that said order was erroneous; that payment to the bank (agent of the assignee) satisfied the judgment; and that the forum of the state where the garnishment was had is the proper tribunal to decide the questions between the plaintiff and said assignee.

(Syllabus by the court.)

APPEAL from District Court, Latah County.

A. E. Gallagher, for Appellant.

Appellant's position is that the courts of this state have no jurisdiction to inquire into the question whether or not the jurisdiction of the superior court of the state of Washington for Spokane county, in the action of appellant against said George W. Goode, has been fraudulently obtained. That is a question which belongs exclusively to the Washington court, and is not for this court to say that the jurisdiction of the Washington court has been fraudulently obtained, or that the process of that court has been abused. Neither the merits of the action in Washington nor the jurisdiction of that court to hear and determine that action in all its phases, or the manner in which that jurisdiction was obtained, is properly before this court, and this court ought not to assume the function of trying questions relative to the rights of personal property when the property is not in this state, and especially when it affirmatively appears

Argument for Respondent.

that the same questions pertaining to the same property rights between the same parties were pending in the courts of another state when these proceedings were commenced in this state. We contend, further, that there is no evidence of any fraudulent design or intent on the part of the appellant or its attorney when the arrangement was made on behalf of appellant to pay said money to said Goode in Spokane, Washington, to garnishee said bank. Had some person other than appellant garnisheed the bank, he certainly could not complain. If appellant saw fit to sue him and garnishee the bank, we do not understand why it had not a legal right to do so. All the instances where courts have released their process because it was fraudulently obtained have been on application to the court out of which the process issued, and in all those cases it was on the ground of fraud, and all the elements constituting fraud and right to relief on account of it was made to appear, and when not shown to exist the application was denied. This will be seen by an examination of the following cases: *Williams v. McGrade*, 13 Minn. 174; *Gilbert v. Burg*, 91 Wis. 358, 64 N. W. 996; *Luckenback v. Anderson*, 47 Pa. St. 123; *Hanna v. Fearl* (Pa.), 18 Atl. 553; *Tua v. Carriere*, 117 U. S. 201-208, 6 Sup. Ct. Rep. 565; *Chubbuck v. Cleveland*, 37 Minn. 466, 5 Am. St. Rep. 864, 35 N. W. 362; *Townshend v. Smith*, 47 Wis. 623, 32 Am. Rep. 793, 3 N. W. 439; *Van Horn v. Great Western Mfg. Co.*, 37 Kan. 523, 15 Pac. 562; *Fitzgerald etc. Con. Co. v. Fitzgerald*, 137 U. S. 98, 11 Sup. Ct. Rep. 36.

S. S. Denning and George W. Goode, for Respondent.

The creditor may sue the debtor in the courts of his own domicile, even though the debtor may have been garnisheed in a foreign state, and if the debtor sets up such garnishment as a defense, the creditor may attack the power or jurisdiction of the foreign court to impound the fund or property in such state. (*Douglass v. Phoenix Ins. Co.*, 138 N. Y. 209, 34 Am. St. Rep. 448, 33 N. E. 938; *McCarty v. Steam Propeller*, 4 Fed. 818.) Where a party has been decoyed into another jurisdiction in order that he may be served with process, it is universally held that service under such circumstances is in the nature

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of a fraud, and therefore invalid and of no effect. The same principles apply to a case of replevin where property is fraudulently decoyed into another jurisdiction. (22 Am. & Eng. Ency. of Law, 166; *Moynahan v. Wilson*, 2 Flip. 130, Fed. Cas. No. 9897.) And the same rule applies in attachment cases. (*Walker v. McCusker*, 65 Cal. 360, 4 Pac. 206; *Chubbuck v. Cleaveland*, 37 Minn. 466, 5 Am. St. Rep. 864, 35 N. W. 362; *Mudge v. Steinhart*, 78 Cal. 39, 12 Am. St. Rep. 17, 20 Pac. 147.)

QUARLES, J.—Appellant, as plaintiff, sued the respondents, Thyrza C. McGregor and others, defendants to obtain judgment of foreclosure of a certain mortgage, and the respondent Thyrza C. McGregor obtained judgment against appellant for costs, taxed at \$214.10. Said respondent then assigned said judgment for costs to her attorney, the respondent George W. Goode. Said Goode afterward, at the request of the attorney for the appellant, sent a receipt for the amount of said costs to the Traders' National Bank of Spokane, Washington, with instructions to deliver said receipt to appellant upon payment by said appellant to said bank of the said sum for the said Goode. The appellant afterward paid said sum into said bank to the credit of said Goode, and received said receipt, which it filed in the court below in said cause. It appears that forthwith after paying said money into said bank the appellant attached or garnisheed the said money in the hands of the bank in a suit which it had commenced against said Goode in the superior court of the state of Washington in and for Spokane county to recover an alleged indebtedness from said Goode to the said appellant. The respondent Goode moved the district court to strike said receipt from the files of the cause, and to direct the clerk of the court to issue execution on said judgment, which order the court made, and from the whole of which the appellant has appealed to this court.

The arrangement made between the appellant and respondent Goode was proper. By reason of said arrangement and the instructions sent to the bank by the respondent Goode, the said bank became the agent of said Goode to receive the said money, and deliver the receipt; and in doing so the said Goode was

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bound by the acts of his said agent. This being true, it results that the said judgment has been paid, the said receipt was properly filed, and the order appealed from was erroneous. As to whether said respondent owes appellant, and whether the said money was properly garnisheed or not, are questions to be determined in the said court of our sister state, which is not only competent, but undoubtedly willing, to do absolute justice between the parties. The respondent has sought the wrong forum. The order appealed from is reversed, and costs of the appeal are awarded to the appellant.

Sullivan, C. J., and Huston, J., concur.

(May 26, 1898.)

MADISON v. PIPER, JUDGE.

[53 Pac. 395.]

CERTIORARI—WHO MAY MAKE APPLICATION.—Under the provisions of section 4963 of the Revised Statutes, the application for a writ of review must be made by the party beneficially interested.

INSOLVENCY—JURISDICTION.—An insolvent against whom an order is made is the party beneficially interested in this case, and may make application for a writ of review, for the purpose of reviewing an order which the judge had no jurisdiction to make.

PETITION THE COMPLAINT—VERIFICATION.—The petition for a writ of review is the complaint and must be made on affidavit. The verification may be made by the attorney for the petitioner if such attorney knows all of the facts set up in the petition, and so states in the affidavit.

INSOLVENT DEBTOR—CANNOT BE REQUIRED TO ACCOUNT FOR UNPRESENTED CLAIM.—A creditor of an insolvent debtor, whose claim was secured by mortgage, and had not been presented, proved and allowed in the insolvency proceeding, made application to have the debtor examined, on oath, in relation to a part of the property included in said mortgage. Thereupon a citation was issued and the debtor was examined, and the judge found that the debtor had disposed of a part of said property, and ordered the debtor to account to the mortgagee for the same. *Held*, that the judge had no jurisdiction to make such order.

(Syllabus by the court.)

Argument for Defendants.

An original proceeding to review order of district judge.

George W. Goode, for Petitioner.

The First National Bank (at the date of the citation and the time for appearing therein) had not filed its claim, nor was it entitled to file its claim until such time as an agreement or sale of the mortgaged property was made, unless it elected to place with the assignee its security. (Rev. Stats., sec. 5911.) Therefore, we submit that the bank had no right to request, nor the judge to grant, the citation to petitioner. (Rev. Stats., sec. 5913; *Lindenthal v. Burke*, 2 Idaho, 571, 21 Pac. 419.) The next question is, Had the judge the jurisdiction to make this order to be reviewed? After a pretended trial the judge orders this insolvent to pay this creditor about \$321.06, when all the records and testimony show that this same insolvent is without a cent and has no property except that which is exempt. Of necessity he must disobey the order of the judge, and unless some kind friend comes to his rescue he must languish in jail for not doing something which it was impossible to do. (*Ex parte Clancy*, 90 Cal. 553, 27 Pac. 411; *Statler v. Superior Court*, 107 Cal. 536, 40 Pac. 949; *Beamer v. Freeman*, 84 Cal. 555, 24 Pac. 169.)

Warren Truitt and S. S. Denning, for Defendants.

The jurisdiction conferred upon this court to issue the writ of review is only exercised when an inferior tribunal, board, or officer exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor any other plain, speedy and adequate remedy. (Rev. Stats., secs. 4962-4968.) On the return of the writ the inquiry cannot be extended further than to determine whether the tribunal, board or officer has exceeded its jurisdiction. (*C. P. R. R. Co. v. Placer Co.*, 43 Cal. 365.) After a petition and schedule in insolvency is filed, the control and dominion of the insolvent's property are transferred to the court. (*Taffts v. Manlove*, 14 Cal. 48, 73 Am. Dec. 610.) A petition in insolvency looks to a discharge as the principal purpose of insolvency proceedings. The findings and order complained of in this case might be used

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to prevent the final discharge of the insolvent. (*Broder v. Conklin*, 98 Cal. 360, 33 Pac. 211.) When the further action of the court in the cause is necessary to give complete relief to the party making the complaint, or to carry out the object of the court, the order or judgment upon which the question arises is not final. (*People v. Lindsay*, 1 Idaho, 394; *Wyatt v. Wyatt*, 2 Idaho, 236, 10 Pac. 228; *Goodday v. Superior Court*, 65 Cal. 581, 4 Pac. 626.) A writ of *certiorari* or review will not lie to an inferior court or tribunal to review or set aside an order which is merely erroneous in a matter, where jurisdiction has been acquired by such court or tribunal. (*People v. Elkins*, 40 Cal. 642; *C. P. R. R. Co. v. Placer County*, 46 Cal. 668; *Buckley v. Superior Court*, 96 Cal. 119, 31 Pac. 8; *Sherer v. Superior Court*, 96 Cal. 653, 31 Pac. 565; *History Co. v. Light*, 97 Cal. 56, 31 Pac. 627; *Farmers' etc. Bank v. Board etc.*, 97 Cal. 318, 32 Pac. 312.)

SULLIVAN, C. J.—This is an original proceeding in this court, whereby the plaintiff seeks by *certiorari* to have reviewed and annulled an order made by the district judge in an insolvency proceeding. In November, 1897, the plaintiff was adjudged to be an insolvent debtor. Subsequently, upon proper notice, the creditors met in open court, and elected J. B. West, Esq., assignee of said insolvent's estate. It appears that only two creditors had at the time of said election filed claims against said insolvent's estate. The First National Bank of Moscow, being one of said creditors, filed as claims two unsecured promissory notes; one for \$162.50, and one for \$171.20. It further appears that said bank also held a promissory note against said insolvent for \$872.50, which was secured by a chattel mortgage on certain crops of wheat and hay and other property; that on the eighteenth day of January, 1898, said bank filed its petition in said district court, which showed that under said mortgage the insolvent had turned over to the bank about one thousand and three and one-half bushels of wheat. It is also alleged that said Madison harvested and kept in his possession a large amount of the hay and grain included in said mortgage, and disposed of the same, and no account thereof had been made to said bank. The prayer of said petition is as follows:

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"1. That said Martin Madison shall be required to appear before said court, or the judge thereof, at such time as may be designated, to answer upon oath as to the amount of grain and hay obtained or grown and harvested from said mortgaged premises for the year 1897; 2. That an order be made herein directing that sale of the wheat now in possession of said corporation above mentioned in such manner as may seem best for the interests of all parties concerned, and the proceeds of such sale credited upon said promissory notes secured by said chattel mortgage, and for such other and further relief as may seem just and equitable in the matter." Upon said application an order was made directing the sale of one thousand and three and one-half bushels of wheat, the warehouse receipts for which were in the hands of said mortgagees, and also ordered that a citation be issued to the plaintiff, Madison, requiring him to appear before the judge of said court at chambers in the city of Moscow on the twenty-sixth day of January to answer under oath in regard to the amount of grain and hay grown and harvested by him in the year 1897 upon the premises described in said chattel mortgage. On the twenty-sixth day of January, 1898, said insolvent appeared as required by the citation aforesaid, and certain testimony was adduced in regard to the hay and grain covered by said chattel mortgage, and the judge found that said Madison had received four hundred and fifty-eight bushels of wheat, which he had not accounted for to said bank, and that the value of the same was fifty-seven cents per bushel; that he had received twenty tons of hay, worth three dollars per ton, which he had not accounted for to said bank. An order was thereupon made requiring said Madison to account to said bank for four hundred and fifty-eight bushels of wheat, or its market value, fifty-seven cents per bushel, and also for twenty tons of hay at three dollars per ton. Counsel for the plaintiff, both before and after said order, objected to the making of said order, on the ground that the court had no jurisdiction to make the same. Thereupon the plaintiff made application to this court for a writ of review, which writ was issued, and upon the day fixed for its return the defendants moved to quash the writ on several grounds.

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The first ground was that the petition did not state facts sufficient to warrant the issuance of said writ. After a careful consideration of the petition, we think its allegations are sufficient to warrant the issuance of the writ.

The second ground of said motion to quash is that the application for the writ is not made by the party beneficially interested. Counsel cites section 4963 of the Revised Statutes which declares, *inter alia*: "The application must be made on affidavit by the party beneficially interested." It is contended that the insolvent is in no wise interested in this matter, and that only the assignee and creditors are, and therefore they only could commence this proceeding. We take it that the insolvent is most vitally interested, especially when an order is made which might prevent his final discharge as an insolvent. If he is unable to comply with the order complained of, and it stands unchallenged, it might prevent his final discharge. The third ground goes to the affidavit. It was made by the attorney for the plaintiff, and it is contended that it must be made by the party beneficially interested. There is nothing in this contention. Section 4963 of the Revised Statutes declares that the application for a writ of review must be made on affidavit by the party beneficially interested. It does not require the verification to be made by the party beneficially interested. The application is the complaint, and it must be made on affidavit, and under section 4199 of the Revised Statutes, the attorney may make the affidavit when the facts are within his knowledge. The attorney states in his affidavit that he knows all of the facts stated in the petition and that he has examined all of the proceedings mentioned in said petition, and that he believes that said court acted without jurisdiction in making said order. The petition shows that the attorney who had examined all of the proceedings complained of would be better acquainted therewith than the client. We think the affidavit sufficient, and under the facts the attorney was authorized to make it.

It is also contended that the order complained of is not finally determined. We are at a loss to know how a matter could be more "finally determined" than this was. The judge entered

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an order directing the insolvent to turn over to the bank four hundred and fifty-eight bushels of wheat and twenty tons of hay, or to pay to the bank the value of the same. We think the matter was finally determined, so far as that proceeding was concerned. The motion to quash must be denied.

In answer to said writ the defendants filed herein the entire record of the proceedings in said matter. But one question is raised by the return, and that is, Had the court jurisdiction to make said order? It appears that the First National Bank of Moscow had several claims against the plaintiff at the time he was declared to be an insolvent debtor, two of which were unsecured, and one or more secured by chattel mortgage. Those not secured were filed against said insolvent's estate, and the bank was admitted as a creditor to the extent of their amount. But the bank had not been admitted as a creditor for said sum of \$876.50 secured by said chattel mortgage, nor could it be admitted as a creditor for said amount unless it released or conveyed its claim upon the mortgaged property to the assignee. Section 5911 of the Revised Statutes, provides as follows: "When a creditor has a mortgage or pledge of real or personal property of the debtor, or a lien thereon, for securing the payment of a debt owing to him from the debtor, he must be admitted as a creditor only for the balance of the debt, after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court or judge may direct; or the creditor may release or convey his claim to the assignee upon such property and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the debtor's right of redemption thereon on receiving such excess; or he may sell the property, subject to the claim of the creditor thereon, and in either case the assignee and creditor respectively must execute all deeds and writings necessary or proper to consummate the transaction. If the property is not sold or released, and delivered up, the creditor must not be allowed to prove any part of his debt." Said section provides, when a creditor has a mortgage on real or personal property of the debtor for securing the payment of a debt, he must be ad-

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mitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by sale thereof, to be made in such manner as the court or judge may direct, or a creditor may be allowed to prove his whole claim if he releases or conveys his claim on the property to the assignee. A person having security for his debt must look to his security to the extent of its value unless admitted as a creditor as provided by said section. The defendant, First National Bank, stood on its security. It made no application to be admitted as a creditor for any balance of its said debt after deducting the value of the mortgaged property. It did make application to sell the wheat that had been turned over to it under said mortgage, which was granted, and the wheat sold for \$572, and said sum indorsed on said indebtedness. As shown by the record, the value of the mortgaged property was only sufficient to satisfy the mortgage debt, and, if the mortgagee had proceeded, and foreclosed the mortgage, there would have been nothing left from the sale of the mortgaged property to go to unsecured creditors. In case of mortgaged property the assignee has the right of redemption, or may sell the property subject to the claim of the creditor. (See Rev. Stats., sec. 5911.) In the case at bar the creditor stood on his rights as mortgagee, and, if the mortgagor had disposed of any of the mortgaged property in violation of the terms of the mortgage, the judge could not grant him relief in insolvency proceedings. The mortgage debt had not been proved nor allowed in the insolvency proceedings, nor had the mortgaged property passed into the hands of the assignee. So far as said debt and mortgage are concerned, they are strangers to the insolvency proceedings, and the judge had no jurisdiction over them in said insolvency matter, and no jurisdiction to make the order complained of. The order complained of must be set aside, and the district judge is directed to set the same aside, and dismiss the application for the examination of the plaintiff. Costs are awarded to the plaintiff.

Huston and Quarles, JJ., concur.

Argument for Appellant.

(May 30, 1898.)

STATE v. EVES.

[53 Pac. 543.]

USURY—RECOVERY OF PENALTY—DUTY OF COURT—APPEAL.—When it is ascertained by the court that an action has been brought on a contract which provides for illegal interest under the provisions of section 1266 of the Revised Statutes, it is the duty of the court to render judgment as directed by said section, and if it fails to do so, the proper procedure on behalf of the state is to move within six months after the adjournment of the term at which such judgment was rendered for the modification of the erroneous judgment, and in case such motion is denied, an appeal lies to this court.

SAME—STATE PARTY AGGRIEVED.—In this case the state was a "party aggrieved," and was entitled to an appeal under the provisions of section 4802 of the Revised Statutes.

(Syllabus by the court.)

APPEAL from District Court, Latah County.

Clay McNamee, for Appellant.

A judgment absolutely void on its face may be attacked anywhere directly or collaterally, either by parties or strangers. (*Joyce v. McAvoy*, 31 Cal. 274, 89 Am. Dec. 172, and note; *Forbes v. Hyde*, 31 Cal. 342.) A judgment void on its face is one that appears to be void by inspection of the judgment-roll, and it is only such judgment that can be attacked either directly or collaterally, without reference to the lapse of time. (*People v. Harrison*, 84 Cal. 607, 24 Pac. 311; *Norton v. Atchison etc. R. Co.*, 97 Cal. 388, 33 Am. St. Rep. 198, 30 Pac. 585, 32 Pac. 452; *Jacks v. Baldz*, 97 Cal. 91, 31 Pac. 899; *Sharp v. Daugney*, 33 Cal. 505; *Ray v. Ray*, 1 Idaho, 566; *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742, and note; Idaho Rev. Stats., 1887, sec. 1266; Sess. Laws 1890-91, p. 47, sec. 3; *State v. Fitzpatrick*, 5 Idaho, 499, 51 Pac. 112; *Vermont Loan etc. Co. v. Hoffman*, 5 Idaho, 376, 49 Pac. 314.)

Forney, Smith & Moore and Cozier & Pickett, for Respondents.

Argument for Respondents.

The question raised by respondent in the first position taken was three times presented to the supreme court of Oregon under a statute more rigid than that of Idaho. The provision of the Oregon statute, see General Laws, page 624, section 3. (*Chapman v. State*, 5 Or. 432; *Holladay v. Holladay*, 13 Or. 523, 11 Pac. 260, 12 Pac. 821; *Sujette v. Wilson*, 13 Or. 514, 11 Pac. 267; *Johnson v. Jonchert*, 124 Ind. 105, 24 N. E. 580, 582; *Mc-Night v. Phelps*, 37 Neb. 858, 56 N. W. 722; *Mason v. Pierce*, 142 Ill. 348, 31 N. E. 503, 504; *Osborn v. First Nat. Bank*, 175 Pa. St. 494, 34 Atl. 858; *Ohio etc. R. R. Co. v. Kasson*, 37 N. Y. 218; *Ladd v. Wiggin*, 35 N. H. 421, 69 Am. Dec. 551-558; *Tenny v. Porter*, 61 Ark. 329, 33 S. W. 211-213; *Stephens v. Muir*, 8 Ind. 352, 65 Am. Dec. 764; *Fessenden v. Taft*, 65 N. H. 39, 17 Atl. 713; *Woolfolk v. Bird*, 22 Minn. 341; *Anderson v. Scandia Bank at Minneapolis*, 53 Minn. 191, 54 N. W. 1062; *New England Mtg. Co. v. Aughe*, 12 Neb. 504, 11 N. W. 723; *Hollingsworth v. Swickard*, 10 Iowa, 385; *Carmichael v. Bidfish*, 32 Iowa, 418; *Frost v. Shaw*, 10 Iowa, 491; *Powell v. Hunt*, 11 Iowa, 432; *Perry v. Kearns*, 13 Iowa, 134.) The great weight of authority conclusively shows that the policy of the legislature in adopting statutes of usury was the protection of borrowers against the oppressive exaction of lenders, and it does not tend to the promotion of that policy that other persons than the victims of usury or persons standing in legal privity with them should have the benefit of such statutes, and therefore it has been the general current of decisions that the plea of usury is a defense personal to the borrower, and a stranger cannot avail himself of it. (*Bensley v. Homier*, 42 Wis. 631; *Ready v. Huebner*, 46 Wis. 692, 32 Am. Rep. 749; *Dolman v. Cook*, 14 N. J. Eq. 56; *Ohio etc. R. Co. v. Kasson*, 37 N. Y. 218; *Bulward v. Yaynor*, 30 N. Y. 197; *Mechanics' Bank v. Edwards*, 1 Barb. 271; *Farmers' etc. Bank v. Kimmel*, 1 Mich. 84; *Campbell v. Johnson*, 4 Dana, 178; *Green v. Kemp*, 13 Mass. 515, 7 Am. Dec. 169; *Huston v. Stringham*, 21 Iowa, 36; *Wright v. Bundy*, 11 Ind. 398; *Stephens v. Muir*, 8 Ind. 352, 65 Am. Dec. 764, and note; *Reading v. Weston*, 7 Conn. 143, 18 Am. Dec. 89; *Fenno v. Sayre*, 3 Ala. (N. S.) 458; *Loomis v. Eaton*, 32 Conn. 550.)

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SULLIVAN, C. J.—This action was brought to vacate and set aside a certain judgment and decree of foreclosure and all proceedings thereunder in the suit of Robert Balfour, R. B. Foreman and Alexander Guthrie, plaintiffs, against Thomas Eves and Ellen Eves, his wife, J. L. Hallett & Sons, and F. N. Hallett, defendants, which action was brought to foreclose a mortgage on real estate belonging to the defendants Thomas and Ellen Eves. The judgment and decree of foreclosure were made and entered on the twenty-eighth day of June, 1894, and the sale thereunder was made September 4, 1895. The appellant demands, in addition to the setting aside of said judgment and all proceedings thereunder, judgment against said Thomas and Ellen Eves for the sum of \$1,950 as a forfeit due the appellant under the provisions of section 1266 of the Revised Statutes, because of the usurious terms and conditions of the promissory notes sued on in said foreclosure suit. The respondents Balfour, Foreman and Guthrie appeared, and demurred to the complaint on three grounds, to wit: "1. That the said complaint does not state facts sufficient to constitute a cause of action; 2. That the court has no jurisdiction of the persons of the defendants or of the subject matter of the action; 3. That the plaintiff herein has no legal capacity to sue, in this: that there is no statute or legislative enactment of Idaho authorizing the state to institute such suit. Wherefore defendants demand judgment on demurrer. Forney, Smith & Moore, Attorneys for Demurring Defendants. Filed November 13, 1897." The demurrer was sustained, and judgment of dismissal entered in favor of the demurring defendants. This appeal is from the judgment.

The order sustaining the demurrer is assigned as error. The penalty for usurious contracts, and the remedy are set forth in section 1266 of the Revised Statutes, which is as follows: "If it is ascertained in any suit brought on any contract that a rate of interest has been contracted for greater than is authorized by this chapter, either directly or indirectly, in money or in property, such contract works a forfeiture of ten cents on the hundred by the year, and at that rate, upon the amount of such contract, to the school fund of the county in which the suit is

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brought, and the plaintiff must have judgment for the principal sum less all payments of principal or interest theretofore made and without interest or cost. The court must render judgment in said action for ten per cent per annum upon the entire principal of said contract, against the defendant in favor of the territory for the use of the school fund of the county, whether the unlawful interest is contested or not; and in no case where unlawful interest is contracted for must the plaintiff have judgment for more than the principal sum less the payments already made, whether the unlawful interest be incorporated with the principal sum or not. But no indorsee in due course of negotiable paper is affected by any usury exacted by any former holder of such paper unless he have actual notice of the usury previous to his purchase; but in such case the judgment above provided in favor of the school fund must be entered against the drawer or maker, if a party to the action, and he may recover back the usury paid from the party who received the same." Said section provides, among other things, that the court must render judgment in such action for ten per cent per annum upon the entire principal of the contract against the defendant in favor of the state for the use of the school fund of the county in which the suit is brought, whether the unlawful interest is contested or not. The state is not authorized to maintain a separate suit for the recovery of the penalty prescribed by said section. In the case at bar it appears that the judgment and decree attacked were made and entered on the twenty-eighth day of June, 1894, and this suit was brought on the twenty-fourth day of August, 1897. Nearly three years had elapsed from the rendition of said judgment before this action was brought to set it aside. We think that the action was not brought in time, conceding that the state was authorized to bring said suit. But we are of the opinion that the state was not authorized to bring said suit. When a court fails, in cases that fall within the provisions of said section 1266, to enter judgment as therein directed, we think the correct practice is for the state on behalf of the county to make a proper showing upon notice to all parties to the record, and move to have such judgment modified so as to make it conform

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to the provisions of said section 1266; and, if the court denies such motion, to appeal from the order denying the same. Such application should be made within six months after the adjournment of the term at which the judgment was entered, as provided by section 4229 of the Revised Statutes. Section 4802 of the Revised Statutes provides that any party aggrieved may appeal in the cases prescribed in the code; and, when it is made to appear, as provided by said section 1266, that a suit is brought on a usurious contract, it then becomes the duty of the court to render a judgment as therein directed. If the court refuses to do so, the state, on behalf of the county in which the suit is brought, is an aggrieved party, and is entitled to an appeal, the same as any party to the suit. But we think the better practice is to make the proper motion to correct or modify the erroneous judgment, and, in case such motion be denied, appeal from the order denying the same. This method of procedure calls the matter directly to the attention of the court, and would, no doubt, in many cases prevent the costs and delay of an appeal. Section 4802 of the Revised Statutes is the same as section 938 of the Code of Civil Procedure of California, and under that section the supreme court of that state have held in *Adams v. Woods*, 8 Cal. 306, that a party aggrieved by a judgment has the right of appeal although he is not a party to the record; and it is laid down as a general rule that no one who is not a party or privy to a judgment or prejudiced thereby has the right of appeal. The test as to whether a party is aggrieved or not is: "Would the party have had the thing if the erroneous judgment had not been entered? If the answer be yea, he is a party aggrieved." In the case at bar, had not an erroneous judgment been entered, judgment in favor of the state would have been entered for the amount of the penalty provided. (See *People v. Pfeiffer*, 59 Cal. 89.) The court made no error in sustaining the demurrer. The judgment of the court below is affirmed, and costs of this appeal awarded to the respondents.

Huston and Quarles, JJ., concur.

Argument of Appellant.

(May 31, 1898.)

BOISE CITY v. FLANAGAN.

[53 Pac. 453.]

EJECTMENT—PUBLIC DOMAIN—TOWNSITE OCCUPANT.—ABANDONMENT.

An occupant upon the public domain of the United States, which land is thereafter platted into blocks, streets and alleys, and entered as provided by an act of Congress, approved March 2, 1867, and known as the Townsite Act, may lose whatever right he acquired by prior occupancy and possession by abandonment, and such abandonment may be inferred from his acts and declarations, and from the declarations of such occupant's grantees.

(Syllabus by the court.)

APPEAL from District Court, Ada County.

A. A. Fraser, for Appellant.

This being an action in ejectment, the plaintiff must recover on the strength of its own title, and not on the weakness of that of the defendant. This proposition I take to be fundamental. The adjudication of the rights of the parties herein must depend upon the construction which will be placed by this court upon the act of Congress of March 2, 1867, known as the "Townsite Act," and particularly upon the construction to be given to the following section of said act. (U. S. Rev. Stats., sec. 2387.) Section 2391 of the Revised Statutes of the United States: "Any act of the trustees not made in conformity to the regulations alluded to in section 2387 shall be void."

1. Does the platting of a townsite upon government lands, which plat shows a certain piece of property as a street, highway or alley, defeat the rights of an actual occupant of said piece of property, who is an occupant thereof within the provisions of the townsite act? 2. Did the failure of the defendant, his predecessors or grantors, to comply with the provisions of the act of the legislature of the territory of Idaho above referred to, forfeit the rights of the defendant to the property in question? We claim not; and in support of this contention we cite the court to the following cases: *Bingham v. Walla*

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Walla, 3 Wash. Ter. 68, 13 Pac. 408; *City of Helena v. Albertose*, 8 Mont. 499, 20 Pac. 817; *City of Pueblo v. Budd*, 19 Colo. 579, 36 Pac. 599; *Alemanly v. City of Petaluma*, 38 Cal. 553. As this is an action in ejectment, the plaintiff has failed to prove any of the facts essential to a recovery in accordance with the rule laid down by this court in the case of *McMasters v. Torsen*, 5 Idaho, 536, 51 Pac. 100.

C. C. Cavanah, for Respondent.

The record conclusively shows that the defendant's predecessor in interest, James Stout, had neither possession nor occupied said premises between said dates and not having record title to the same, the premises were abandoned when its possession and occupancy were voluntarily forsaken and deserted by the party. (*Thompson v. Holbrook*, 1 Idaho, 609; *Young v. Tiner*, 4 Idaho, 269, 38 Pac. 697; *Eads v. Brazleton*, 22 Ark. 509, 79 Am. Dec. 88; *Springfellow v. Cain*, 99 U. S. 610; *Kirk v. King*, 3 Pa. St. 441; *Vickery v. Benson*, 26 Ga. 589; *Bequette v. Caulfield*, 4 Cal. 278, 60 Am. Dec. 615; *Gluckart v. Reed*, 22 Cal. 468; *Burk v. Hammond*, 76 Pa. St. 172; *Dickes v. Miller*, 24 Tex. 424; *Davis v. Butler*, 6 Cal. 510.) The record in this case establishes an admitted fact that James Dunn, the deceased, did on different occasions, by his acts and declarations, admit the title and right of possession of said premises to be in the plaintiff. (*Church v. Burghardt*, 8 Pick. 327.) Lapse of time and delay may warrant inference of abandonment. (*Keane v. Cannovan*, 21 Cal. 297, 82 Am. Dec. 738; *Gluckart v. Reed*, *supra*.)

SULLIVAN, C. J.—This is an action in ejectment brought by the city of Boise, a municipal corporation, against James Flanagan, as administrator of the estate of James Dunn, deceased, to recover possession of what is claimed to be a part of what is known as "Fort street," and connecting First and Second streets, in said city. The cause was tried upon an agreed stipulation of facts, and judgment went in favor of the city. This appeal is from the judgment.

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The errors assigned go to the sufficiency of the evidence to justify the decision and that the decision is against law. The following appears from the agreed stipulation of facts: Boise City, in Ada county, was founded and established upon unsurveyed public land of the United States; and a map or plat of said city, exhibiting the streets, blocks, lots, and alleys, and size of same, was filed by Henry E. Prickett, then mayor of said city, in the county recorder's office, of Ada county, on the twenty-fifth day of November, 1867, under an act of Congress entitled "An act for the relief of the inhabitants of cities and towns upon the public domain, approved March 2, 1867." A patent was issued to the said mayor for the land included in and covered by said plat in trust for the several use and benefit of the occupants of said townsite according to their respective interests. The following facts appear from the record: That one James Stout, the predecessor and grantor of said James Dunn, deceased, settled upon and was an actual occupant of the premises in dispute, in connection with what is termed and designated on said plat as a "fractional block," prior to the passage of said act of Congress; and that on the tenth day of January, 1871, said Stout made application to the mayor of said city for a deed to said fractional block, in compliance with an act of the territorial legislature providing regulations for the execution of the trust created by said act of Congress. Said application did not include the premises in dispute, although it was a part of the tract claimed by said Stout, and contiguous to said fractional block. A deed was executed to said Stout for said fractional block, and he thereafter conveyed the same to James Dunn, and by which deed he undertook to convey the premises in dispute to said Dunn. It is admitted that the premises in dispute were first inclosed in 1878, and that the city since that date had repeatedly asserted its right to the possession and control of said premises, and had repeatedly notified said Dunn to remove the fences and improvements therefrom, and that he had promised to do so, and that said Dunn has not applied for a deed to said premises, and has never paid any taxes thereon.

It will be observed, from the foregoing facts, that at the date of filing the town plat of Boise City the land conveyed by,

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and included in, said plat was a part of the public domain of the United States, and the title thereto in the United States, and that one James Stout was in the occupation and possession of the tract in controversy, in connection with a small tract adjoining the same, both of which he held as one tract; that, after platting or dividing said townsite into blocks, streets and alleys, a part of the tract so claimed by Stout lay in the street, and a part was platted as a fractional block; that thereafter, to wit, on the second day of May, 1870, the United States conveyed, by patent, the land included in said Boise City townsite as platted as aforesaid to Henry E. Prickett, then mayor of said city, in trust for the several use and benefit of the occupants of said townsite; and thereafter the legislature of the territory of Idaho passed an act which provided for the disposal of said lands as authorized by said act of Congress. Shortly after the passage of said act by the legislature of the territory of Idaho, said Stout made application thereunder to the mayor of said city for a deed to said fractional block, in which application he did not include the premises in controversy, which had at that time been platted as a street. A deed was issued to him by the mayor for said fractional block. He thereafter, in May, 1871, sold and conveyed said fractional block to the said James Dunn, in which conveyance is also described the land in controversy. Said land in controversy had not been inclosed up to that date, and was not inclosed by said Dunn until in June, 1878; from which time, down to the commencement of this suit, the city repeatedly asserted its control, and right to control, over said tract as a part of one of the streets of said city, and repeatedly notified said Dunn to remove all fences and improvements from said premises, which said Dunn promised to do.

It is contended by counsel for appellant that, at the time said plat was filed, the title to said land was in the United States, and for that reason no dedication of said street was made, as a dedication, to be valid, must be made by the holder of the legal title. Said act of Congress, under which said city was acting, authorized the platting of said land into blocks, streets and alleys, and the dedication of such streets

to the use of the public. That contention is without any force, as the owner of the fee authorized the dedication, as set forth in said act of Congress.

Stout, by his acts, to wit, after the premises claimed by him had been platted, a part of it into a fractional block, and the remainder into a street, showed his intention to conform his claim to said plat by making application for a deed to said fractional block, and making no application whatever for that part included in the street. A deed was executed to him for the land included in his said application, and no application has been made by him or his grantee for a deed to the land in controversy. It remained open, without improvements, until June, 1878, when the said James Dunn placed a fence around it, and made other improvements thereon. Thus, for about eleven years the land lay without any improvements; and said decedent or his grantor never listed said land for assessment and taxation, and no taxes have been levied against it; and said Dunn was notified at divers times to remove said improvements from said premises by the city authorities, and he promised to do so. Thus, by the acts of said James Stout, grantor of James Dunn, now deceased, and by the acts and declarations of said James Dunn, they admitted title and right of possession of said premises in the respondent city. The conclusion is irresistible that, if said Stout ever had a right to said premises as a townsite occupant, he abandoned it. (See *Young v. Tiner*, 4 Idaho, 269, 38 Pac. 697; *Thompson v. Holbrook*, 1 Idaho, 610.) And said Dunn recognized the authority of the city over said premises by promising to remove therefrom certain fences and other improvements that he had placed thereon. The judgment of the court below is affirmed. Costs awarded to the respondent.

Huston and Quarles, JJ., concur.

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(May 31, 1898.)

HOWELL v. BOARD OF COMMISSIONERS OF ADA
COUNTY.

[53 Pac. 542.]

COUNTY COMMISSIONERS—NO AUTHORITY TO REFUND TAX—COURT WILL NOT PASS ON VALIDITY OF LAW UNLESS NECESSARY.—Boards of county commissioners have no authority to refund a tax that has been paid, whether the tax was illegal or not. Boards of commissioners are not clothed with judicial functions, and are not authorized to pass upon the validity of a statute. Courts will not pass upon the validity of a statute in any case unless necessary to a decision of the case under consideration.

(Syllabus by the court.)

APPEAL from District Court, Ada County.

Brown & Cahalan, for Appellant.

No authorities cited on question decided.

Hawley & Puckett, for Respondent.

A tax voluntarily paid cannot be recovered back; the authorities are generally agreed, and it is immaterial in such a case that the tax has been illegally paid, or even that the law under which it was paid is unconstitutional. The principle is an ancient one in the common law, and is of general application. Every man is supposed to know the law, and if he voluntarily makes a payment which the law cannot compel him to make, he cannot afterward assign his ignorance of the law as the reason why the state should furnish him with legal remedies to recover it back. (Cooley on Taxation, 809.)

SULLIVAN, C. J.—The appellant, William Howell, presented his claim against the county of Ada, for a rebate of taxes paid on five thousand head of sheep for two and one-third months, for sixty-eight dollars and ninety-seven cents. The board of commissioners of said county disallowed said claim. Thereupon said Howell appealed to the district court, where

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the case was tried *de novo* upon an agreed statement of facts, and the order of the board of commissioners was affirmed. This appeal is from the judgment of the district court affirming the order of said board. It appears from the agreed stipulation of facts that said Howell, in the year 1897, made a written statement under oath, as required by statute, and delivered the same to the assessor and tax collector of said Ada county, showing, among other things, that he was the owner of five thousand head of sheep, and that said sheep would be kept in said county during the year for the period of nine and two-thirds months; and thereafter he drove said sheep into Boise county, and made a similar written statement to the assessor of said Boise county, showing that said sheep would be kept in said Boise county for a period of two and one-third months during said year 1897; and thereupon said sheep were assessed to him in said Boise county for said period of two and one-third months, and the taxes paid. The assessor of Ada county, instead of assessing said sheep to the appellant for the said period of nine and two-thirds months, assessed them to him for the entire year of 1897. He paid the taxes so assessed, and presented his claim against the county January 15, 1898, aforesaid, and it was not allowed. It also appears from the stipulation of facts that the board of commissioners based the order disallowing said bill for rebate of said taxes upon the alleged unconstitutionality of "an act entitled 'An act to regulate the assessment and taxation of livestock when kept, driven or pastured, or that may range in more than one county of this state.'" (See Sess. Laws, 1897, p. 22.)

The question that meets us at the threshold of this case is whether the board has the authority to rebate or refund the taxes, as claimed by the appellant. In support of the contention of the appellant, counsel cites several California authorities, and among them the case of *Hayes v. Los Angeles Co.*, 99 Cal. 74, 33 Pac. 766, in which the court holds that taxes erroneously or illegally collected may be refunded by order of the board of commissioners. That decision is based upon section 3804 of the Political Code of California, which is as follows: "Any taxes, per centum, and costs erroneously or illegally collected,

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may, by the order of the board of supervisors, be refunded by the county treasurer." Our revenue statutes were largely copied from those of California, but said section 3804 was not adopted by the legislature of this state. The legislature having failed to adopt the section of the California statute on which said decision rests, that opinion is not an authority in the case at bar. The court requested respective counsel to furnish it with a citation of authorities, if any they had, holding that the board of commissioners had the power to refund taxes which had been paid. Several authorities have been cited, all of which are from California, and are not, for the reason above given, authority in this case. We know of no law in this state, nor has counsel cited us to any, authorizing a board of county commissioners to refund a tax which has been paid, whether the tax is illegal or not.

As the board of commissioners had no power to allow said claim under any state of fact, and the primary question involved being one of jurisdiction, it was unnecessary and improper for the board or the court to pass upon the validity of said act. The rule recognized by all courts is that the validity of a statute will not be passed upon in any case unless it is necessary to a determination of the case. That being the correct rule, the validity of said statute could not be passed upon in the determination of this case. The board of county commissioners, as shown by the record, held said act to be void. This court, in *Hampton v. Dilley*, 3 Idaho, 427, 31 Pac. 807, quoting from *People v. Saloman*, 54 Ill. 46, said: "To allow a ministerial officer to decide upon the validity of a law would be subversive of the objects and purposes of government, for, if one officer may assume infallibility, all other like officers may do the same, and thus an end be put to civil government, one of whose cardinal principles is subjection to the laws." It is also held in said opinion that it is the duty of all good citizens to obey whatever the law-making power promulgates as law, until the same shall have been passed upon by the courts in a proper and legitimate manner. Our statutes are ample to protect the citizen from illegal taxation, and in case an illegal tax is levied, if the person fails to appear before the board of equalization that

Argument for Appellants.

is provided for by law, he has another remedy—by injunction—to prevent the collection thereof. But when, as in this case, there is no appearance before the board of equalization, and no application made for the correction of said assessment, and the tax is voluntarily paid, the board is without authority to refund the tax so paid. The conclusion reached by the trial court is correct, but was arrived at upon a wrong theory. The judgment of the court below is affirmed, on the ground that a board of commissioners has no authority or power to refund taxes that have been paid. Affirmed. Costs of appeal awarded to respondent.

Huston and Quarles, JJ., concur.

(June 1, 1898.)

ELLIOTT v. COLLINS.

[53 Pac. 453.]

TAXING COSTS—MEMORANDUM AS PROVIDED BY LAW A PRIMA FACIE CASE.—On a motion to tax costs, a memorandum of costs verified and filed as provided by section 4912, and amendments thereto, makes a *prima facie* case for the party entitled to the costs, and in order to justify a taxation thereof by the judge the dissatisfied party must overcome by proof the *prima facie* case made by such memorandum.

(Syllabus by the court.)

APPEAL from District Court, Nez Perces County.

Eugene O'Neill, for Appellants.

The plaintiffs had a right to have the questions of fact raised by the pleadings tried by a jury. (Idaho Const., art. 5, sec. 1; Idaho Rev. Stats., sec. 4383, subd. 1.) This was a jury case, and all questions of fact should have been presented to them for their decision, including, when pleaded, any questions of election of remedies. It was an action for money as damages, there was no waiver of jury, and no reference. (Idaho Rev. Stats., sec. 4369; *Yager v. Exchange Nat. Bank*, 52 Neb. 321,

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72 N. W. 211; Idaho Const., art. 1, sec. 7; art. 5, sec. 1; *Morris v. Rexford*, 18 N. Y. 552.) Under the general rule of law there could be no election in this case, as only the present case could be maintained. (*Carson River Lumber Co. v. Bassett*, 2 Nev. 249; *Snow v. Alley*, 156 Mass. 193, 30 N. E. 691; *Saville v. Welch*, 58 Vt. 683, 5 Atl. 491, 493, 494; *Songer v. Wood*, 3 Johns. Ch. 416.) But the bringing of an action and the dismissing of the same before trial or judgment is not an election. (*Equitable Co-operative Foundry Co. v. Hersee*, 103 N. Y. 25, 9 N. E. 487; *Bolton Mines Co. v. Stokes*, 82 Md. 50, 33 Atl. 491, 493.)

James W. Reid, for Respondent.

It is certainly the established law in every state that has spoken on the subject, that the definite adoption of one of two or more inconsistent remedies, by a party cognizant of the material facts, is a conclusive and irrevocable bar to his resort to the alternative remedy. (7 Ency. of Pl. & Pr., 364, and authorities there cited; *Rucker v. Hall*, 105 Cal. 425, 38 Pac. 962.)

SULLIVAN, C. J.—This is an appeal from an order taxing costs. It appears from the record that a memorandum of costs was filed as provided by section 4912 of the Revised Statutes, as amended by Session Laws of 1895, page 6. It also appears that the respondents, who were the plaintiffs in the court below, were dissatisfied with the costs claimed, and made a motion for a taxation of the same. Said motion was heard, and the record shows that the only evidence considered by the judge in the hearing was the memorandum of costs duly verified by the attorney for the appellant, and a subpoena that had been issued in the case. The judge taxed the costs, and in so doing struck out the witness fees and charges of four witnesses. The memorandum of costs introduced on the hearing of said motion made a *prima facie* case for the appellant, and the respondents introduced no evidence whatever to overcome the case so made. The judge therefore erred in taxing said costs. The order taxing costs is reversed, and the case remanded. Costs of this appeal are awarded to the appellant.

Huston and Quarles, JJ., concur.

Points decided.

(June 15, 1898.)

STATE v. DAVIS.

[53 Pac. 678.]

EVIDENCE—COMPETENT TO SHOW MOTIVE.—The defendant was a cattleman, the deceased a sheepman. The state was permitted, over the objections of the defendant, to prove that the accused was making war against sheepmen generally, and threatening the lives of all sheepmen who failed to keep off a certain range; the deceased, a sheepman, was killed on such range; and the circumstances pointed to the accused as the guilty party. *Held*, that the evidence objected to was competent, as it tended to show motive on the part of the defendant.

SAME—OTHER CRIME—THREATS AGAINST A CLASS.—When the accused was making war against a class of men (sheepherders) and threatening to keep them off a certain range by use of deadly weapons, and had made threats against sheepherders generally, and against the person of the deceased, who was a sheepherder, it was competent for the state to prove that two days before the homicide the defendant had attacked, with such weapons, the camp of other sheepherders, as such evidence tended to show the state of mind of the defendant toward the deceased, and to establish motive on his part to commit the crime.

SAME—COMPETENT TO SHOW ACCUSED FLED THE STATE.—It is competent, on a murder trial, to show that immediately after the commission of the crime the defendant fled the state and was afterward arrested in another state, where he was going under an assumed name.

ALIBI—WHAT MUST BE SHOWN.—The gist of the defense of *alibi* consists in showing that at the time of the commission of the alleged crime the defendant was at a place different from that where the crime was committed.

CONFESSION BY AN ACCUSED.—A confession, or declaration tending to show guilt made by an accused while under arrest, of his own volition, and without any threat or promise or inducement having been made or held out to him by such officer or other person present, is competent evidence on the trial of a criminal case.

NEW TRIAL—WHEN SHOULD NOT BE GRANTED.—A new trial should not be granted on the ground of newly discovered evidence where such evidence is merely cumulative, or where it was within the power of the defendant, by the use of reasonable diligence, to have produced such evidence on the trial.

SAME—GROUND FOR NEW TRIAL, SECTION 7952, REVISED STATUTES.—If it be a ground for new trial, under section 7952 of the Revised

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Statutes, that a juror, prior to the trial, expressed an opinion that the defendant is guilty, which is doubted, one or two *ex parte* affidavits are not sufficient to overcome the positive statement of such juror, made on his *voir dire* examination, that he has no opinion, and has never formed or expressed an opinion, as to the guilt or innocence of the accused, and such juror is shown to have a good reputation for truth and veracity among his neighbors and acquaintances.

SAME—GROUNDS STATUTORY.—The grounds for a new trial are statutory and cannot be extended by the courts by rule.
(Syllabus by the court.)

APPEAL from District Court, Cassia County.

Hawley & Puckett and K. I. Perky, for Appellant.

In cases of circumstantial evidence the rule is, that not only must the proof be consistent with the prisoner's guilt, but must be consistent with every other rational conclusion. (*People v. Strong*, 30 Cal. 151; *People v. Schuler*, 28 Cal. 490; 1 Greenleaf on Evidence, 12th ed., sec. 34; 1 Starkie on Evidence, 181, 182.) Evidence of a prior crime can have no legitimate place in the investigation of the commission of a subsequent crime by the same person. (*People v. Sharp*, 107 N. Y. 427; 1 Am. St. Rep. 851, 14 N. E. Rep. 319.) In an indictment for murder committed during a riot, in which the prisoner was engaged, it is incompetent to prove other riotous acts by him several hours earlier at a different place, unless it is first shown that those acts were all part of one transaction. (*Commonwealth v. Campbell*, 7 Allen, 541, 83 Am. Dec. 705; *People v. Lane*, 100 Cal. 379, 34 Pac. 856; *Shaffner v. Commonwealth*, 72 Pa. St. 60, 13 Am. Rep. 649; *Chipman v. People*, 24 Colo. 520, 52 Pac. 677; *Farris v. People*, 129 Ill. 129, 16 Am. St. Rep. 283, 21 N. E. 821; *State v. Lapage*, 57 N. H. 245, 24 Am. Rep. 69; *Boyd v. United States*, 142 U. S. 450, 12 Sup. Ct. Rep. 292; *Hall v. United States*, 150 U. S. 76, 14 Sup. Ct. Rep. 22; *State v. Reavis*, 71 Mo. 421; *Brook v. State*, 26 Ala. 106.) The general rule, as we understand it, is, that on an indictment for murder, proof of previous threats made by the defendant against the deceased, is competent as showing malice, and if made long enough before the homicide, as evidence of premeditation and deliberation. (9 Am. & Eng. Ency. of Law, 686, note 1.)

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But, however, if in making a threat it is directed toward a certain individual or individuals, specifying them, they are not admissible upon the trial of defendant for killing another person. (*Carr v. State*, 23 Neb. 749, 37 N. W. 630; *Aberbathy v. Commonwealth*, 101 Pa. St. 322; 9 Am. & Eng. Ency. of Law, 687; *Clark v. State*, 78 Ala. 474, 56 Am. Rep. 45; *People v. Bezy*, 67 Cal. 223, 7 Pac. 643.) We have alleged as an error the admission of the testimony of E. R. Dayley in regard to conversations with defendant while on the road to Albion from Arizona; and while defendant was under arrest and partially in the custody of the witness. This conversation was clearly improper under the general rules of law and the rulings of our supreme court. (*State v. Crump*, 5 Idaho, 166, 47 Pac. 814; *State v. Mason*, 4 Idaho, 543, 43 Pac. 63.) Where a party has examined a juror as to his qualification, and the juror does not answer truly, it is manifest that the party is deprived of his right of challenge for cause, and deceived into foregoing his right of peremptory challenge. Therefore, when such a state of facts is proven, a new trial will be granted. (*Rusich v. State*, 19 Ohio, 798; *Rice v. State*, 10 Ind. 300; *Wiggin v. Plummer*, 31 N. H. 272; *State v. Burnside*, 37 Mo. 347; *United States v. Upman*, 2 Mont. 170; *Territory v. Kennedy*, 3 Mont. 520.) The misconduct of a juror is more closely scrutinized, and more nearly affects the verdict in a criminal than in a civil case. (*Morrow v. Commissioners*, 21 Kan. 484; *Queen etc. v. Hepburn*, 7 Cranch, 297 (decision by Chief Justice Marshall); *Monroe v. Georgia*, 5 Ga. 85.)

Attorney General R. E. McFarland, W. E. Borah and O. W. Powers, for the State.

The fact that a juror after trial is found to have formed or expressed an opinion before going on the jury is not ground for a new trial under our statute. (Idaho Rev. Stats., sec. 7952; *People v. Mortimer*, 46 Cal. 114-121; *People v. Samsels*, 66 Cal. 99, 4 Pac. 1061; *State v. Marks*, 15 Nev. 33; *State v. Gyle*, 8 Wash. 12, 35 Pac. 417; *Spies v. People* (The Anarchist Case), 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 867, 992, 993, 17 N. E. 898; *State v. Peterson*, 38 Kan. 204, 16 Pac. 264; *Hughes*

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v. People, 116 Ill. 330, 6 N. E. 55; *State v. Brookes*, 92 Mo. 542, 5 S. W. 257; *Territory v. Burgess*, 8 Mont. 57, 19 Pac. 558.) It is an established rule that newly discovered evidence on motion for a new trial is looked upon with distrust and disfavor by the courts. (*Baker v. Joseph*, 16 Cal. 180; *People v. Sutton*, 73 Cal. 243, 15 Pac. 86; *People v. Howard*, 74 Cal. 547, 16 Pac. 394; *People v. Freeman*, 92 Cal. 359, 28 Pac. 261-264; *Harraleson v. Barrett*, 99 Cal. 607, 34 Pac. 342; *O'Brien v. Brady*, 23 Cal. 243; *Jones v. Singleton*, 45 Cal. 94; *Hoblar v. Cole*, 49 Cal. 250; *Arnold v. Skeggs*, 36 Cal. 54.) Newly discovered evidence which is merely cumulative or designed to contradict witnesses is not of a character to warrant a new trial. (*People v. Anthony*, 56 Cal. 397; *People v. Sutton*, 73 Cal. 243, 15 Pac. 86; *State v. Hardy*, 4 Idaho, 478, 42 Pac. 507; *People v. Fong Ah Sing*, 70 Cal. 8, 11 Pac. 324; *People v. Cesena*, 90 Cal. 381; 27 Pac. 300; *People v. Biles*, 2 Idaho, 114, 6 Pac. 120; *People v. Peacock*, 5 Utah, 237, 14 Pac. 332; *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161.) A new trial will not be granted upon evidence that is in conflict with evidence given at the trial. (*People v. Freeman*, 92 Cal. 359, 28 Pac. 261; *People v. O'Neal*, 67 Cal. 378, 7 Pac. 790; *People v. Mazuley*, 45 Cal. 148.) Confessions under circumstances similar to those at bar have been admitted so often that it would be difficult to collate all the authorities upon the proposition. Our understanding is that the rule is well established. (*People v. Tie*, 32 Cal. 60; *People v. Smalling*, 94 Cal. 112, 29 Pac. 421; *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161; *People v. Long*, 43 Cal. 444; *People v. Devine*, 46 Cal. 46.) Declarations and threats are admissible, not because they give rise to a presumption of law as to guilt, which they do not, but because from then, in connection with other circumstances, guilt may be logically inferred. (Wharton on Criminal Evidence, sec. 756; *State v. Hardy*, 4 Idaho, 478, 42 Pac. 507; *Hopkins v. Commonwealth*, 50 Pa. St. 9, 88 Am. Dec. 518; *Dixon v. State*, 13 Fla. 636; *Spies v. People*, 6 Am. Cr. Rep. 570.) It is true, as a general rule, that on a prosecution for one crime, it is not proper to prejudice the jury against the prisoner by showing him to have been guilty of another, but where the evidence is relevant and material on the question of

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the guilt of the prisoner of the crime for which he is upon trial, it cannot be excluded merely because it also proves him guilty of another crime. (*Hope v. People*, 83 N. Y. 418, 38 Am. Rep. 460; *Kernau v. State*, 65 Md. 253, 14 Atl. 124; Wharton on Criminal Evidence, secs. 31, 32; *People v. Weed*, 56 N. Y. 628; *People v. Doyle*, 21 Mich. 227; Roscoe on Criminal Evidence, sec. 86; *State v. Cowell*, 12 Nev. 344; *Swan v. Commonwealth*, 4 Am. Cr. Rep. 189; *People v. Cummings*, 66 Cal. 668, 4 Pac. 1144, 6 Pac. 700, 846; *People v. Walters*, 98 Cal. 138, 32 Pac. 864.) It is proper in a criminal case to prove the commission by the accused of another and collateral crime, where such crime furnished a motive for the commission of the crime for which the accused is being tried. For the purpose of showing motive, the remoteness in point of time of the commission of the collateral crime cannot be considered. Syllabi. (*People v. Harris*, 136 N. Y. 423, 33 N. E. 65; *Moore v. United States*, 150 U. S. 57, 14 Sup. Ct. Rep. 26.) Insufficiency of evidence to justify the verdict. (*State v. Haverly*, 4 Idaho, 484, 42 Pac. 506; *State v. Larkins*, 5 Idaho, 200, 47 Pac. 945; *People v. Simpson*, 50 Cal. 304; *State v. Crozier*, 12 Nev. 300; *Palmer v. State*, 4 Neb. 68.)

QUARLES, J.—The appellant was, at the April term of the district court of the fourth judicial district, in and for Cassia county, tried upon the charge of murder, committed upon the person of one John C. Wilson, and convicted. Thereafter the appellant, whom we hereafter designate as the defendant, moved for a new trial, which was denied him. The defendant then took two appeals to this court—one from the judgment of conviction, and the other from the order denying him a new trial. These two appeals, by consent of both parties, were argued and submitted together, and we will consider both appeals together. On the hearing the defendant was ably represented by James H. Hawley, Esq., and K. I. Perky, Esq., and the state was ably represented by Messrs. O. W. Powers and W. E. Borah. (The attorney general made no oral argument.) The case has been carefully, fully, and ably briefed on both sides.

The application for a new trial was based upon the following grounds: "1. That the verdict was decided by means other than

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a fair expression of opinion on the part of all the jurors; 2. That the court misdirected the jury in matters of law during the course of the trial; 3. That the court erred in decisions of questions of law arising during the course of the trial; 4. That the verdict is contrary to law; 5. That the verdict is contrary to the evidence; 6. That new evidence has been discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial."

The errors relied upon by the defendant are as follows: "1. Error in overruling motion for new trial upon the ground of the evidence being insufficient to justify the verdict, in the following particulars, to wit: (1) The evidence fails to show that defendant was present at the time of killing of the deceased or at the time deceased received his mortal wounds, or that defendant was an accessory or privy thereto; (2) That the evidence fails to show when deceased received his wounds resulting in his death, or when he died; (3) That the evidence shows that deceased received the wounds from which he died, and died, after the fourth day of February, 1896; (4) That the evidence shows that the defendant was not in the vicinity of the killing of deceased, or any place where it was possible for him to have been concerned in said killing, after the 4th day of February, 1896; (5) That the evidence shows that defendant could not have been at the place of killing on February 4, 1896, and could not have been guilty of the murder of deceased, by reason of the impossibility of his riding from the Brown ranch, at the time he was proved to have been there on that day, to the place of killing, and from there back to the Boar's Nest ranch, at the time that the evidence shows that he was at said place on said day; (6) That the evidence fails to show any motive on the part of defendant for killing deceased; (7) That the evidence fails to show any intention on the part of defendant to kill deceased, or any reason or object for said course on his part, and, further, fails to show that he knew deceased or his companion, or knew of his presence or whereabouts at the time of the killing; (8) That the evidence fails to show that deceased was murdered; that it fails to show a premeditated, deliberate, or malicious killing by defendant or anyone else; (9) That the evidence fails to show

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the guilt of defendant beyond a reasonable doubt, or to show his guilt at all; (10) That the evidence fails to show that the defendant was in possession or had under his control any weapon such as would account for the fatal wound on deceased; (11) That the evidence, taken as, and considered as, threats, does not and did not refer to deceased or his companion, but to other persons not connected with either of them, and that there is no evidence of threats by defendant against deceased; (12) That the conversation testified to by witnesses as having taken place and been had with the defendant referred, not to the killing of Cummings and Wilson, but to other matters not connected therewith. 2. Error in permitting evidence of other offenses to wit, the shooting affray at Wilson's camp on the night of February 2, 1897, to be given in evidence. 3. Error in allowing witnesses to testify as to the conversations and alleged threats, and threatening and abusive language, of defendant in Shoshone Basin, during the summer and fall of 1896, and in refusing defendant's motions to strike out such conversations and statements. 4. Error in allowing in evidence conversations had between defendant and officers having him in custody, while on the road to Albion, after his arrest. 5. Error in allowing witness Perkins to give his opinion to jurors in regard to what vital parts of deceased were penetrated by the bullets that caused his death. 6. Error in allowing witness Dr. Story to state his opinion of the relative position of the parties when the fatal shot was fired. 7. Error in refusing to strike out the evidence of witness James Dunn, found in subdivision 5 of errors, folio 1167 of transcript. 8. Error in allowing the paper picked up at the camp of Wilson and Cummings to be introduced in evidence. 9. Error in allowing witness E. R. Daley to testify as to the place where he found defendant at the time of his arrest, and the name he was there known by. 10. Error in allowing exhibits Nos. 5 to 11, offered by the prosecution, to be put in evidence. 11. Error in refusing a new trial upon the ground of newly discovered evidence. 12. Error in refusing to grant a new trial to defendant upon the ground of misconduct of the jury. 13. Error in refusing a citation to Addie Gordon, and to compel her to testify as to conversations had by Juror George

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W. Gray in her presence. 14. Error in refusing to strike plaintiff's affidavits from the files, and in allowing them to be read upon the hearing, upon motion for new trial. 15. Error in allowing the affidavits mentioned in bill of exceptions No. 3 to be used upon motion for new trial. 16. Error in overruling defendant's motion for new trial."

The first error assigned is not, in our opinion, sustained by the record. It is true that no eye-witness swore to the fact that the defendant was present at the time and place the homicide occurred; still all of the circumstances point to his presence, and also to the fact that he did the killing. The evidence shows that the deceased received his wounds on or about the fourth day of February, 1896, and died soon thereafter. The evidence shows motive and premeditated design on the part of the defendant to commit the homicide. The evidence tends to show that the deceased was killed on the morning of the 4th of February, 1896. The evidence shows that the deceased was killed by a 44-caliber shot, and it shows that, just before the homicide occurred, the defendant was shooting 44 cartridges from a 45-caliber pistol. The evidence shows that the deceased and his companion, Cummings, were sheepmen, engaged in herding sheep, and that defendant had repeatedly made threats against the lives of sheepmen; and that about the time of the killing the defendant, with another companion, Jack Gleason, were riding the range armed with Winchester rifles, revolvers, and dynamite.

While considering this first assignment of error, we deem it proper to point out the facts established by the evidence, showing the conditions that existed in the locality of the crime, and the conduct of the defendant before and after the homicide. Cassia county is a stock county, some of its residents being engaged in raising cattle, and others in raising sheep. Trouble arose between the cattlemen and the sheepmen, the former claiming that the sheepmen were trespassing upon the range which peculiarly belonged to them. After pointing out the conditions that existed counsel for the defendant in their brief, at page 11, says: "Disputes again arose, and considerable feeling developed between the various owners, during the year 1896,

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and, although there were no serious outbreaks, the condition was such as to perhaps warrant the belief that irreconcilable conflict was on between the two classes of stockmen." The deceased, Wilson, with his companion, Cummings, were engaged in herding sheep on the range between Goose creek and Deep creek, near the dividing ridge, in the Shoshone Basin. On the morning of February 4, 1896, the deceased, Wilson, and Cummings, were seen at their camp about 8 o'clock of that morning, apparently preparing for breakfast. They were living in a covered wagon, containing a bed, stove, and cooking utensils, such as is commonly used by sheepherders. They had two dogs tied to the wheels of their wagon. Twelve days later, or February 16th, they were found dead in their wagon, both having been shot. The dogs were still tied to the wagon, and were poor and emaciated, and their sheep were scattered in bands in the vicinity. Some uncooked bread was in the stove. The condition of the bodies showed that they had been dead from ten days to two weeks. The body of Wilson was covered with an overcoat, that of Cummings was uncovered. Blood was found on the ground in front of the wagon, on the wagon tongue, on the front part of the wagon sheet, and in the wagon. Both Wilson and Cummings had been shot with 44-caliber bullets, and the face and arms of Wilson were powder burned. Apparently both were wounded, and Cummings had assisted Wilson to bed, and threw an overcoat over him. The locality of the wounds on the bodies pointed beyond question to the fact that they had been killed by a third party or parties. There was only one firearm about the wagon when the bodies were discovered—an old rifle, that had not been used since it was last cleaned. Wilson was shot in the back, and one shot had struck his chin, and entered his chest, and passed through his right lung, and through his liver. Cummings had been shot through the body, the bullet cutting his intestines. The condition of Cummings' body and the nature of his wounds tended to show that he had lived from one to twenty-four hours after the shooting. As many as four empty 44-cartridge shells were found near the wagon, in a direct line ranging from three to twenty feet from the wagon. The defendant had been from the 24th of July, 1895, in the employ

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of a large cattle company, having large herds and a number of ranches in Cassia county, and cattle and interests and ranches across the Idaho line, in Nevada. During the summer and fall of 1895 the defendant had threatened different sheepmen, and had declared repeatedly that he would keep his sheepmen off of the range in Shoshone Basin west of the dividing ridge between Deep creek and Goose creek, and which was claimed by the cattle men. Defendant told James Dunn and Oliver Dunn that they could not go any farther on that range with their sheep; that, if they did, they would have to face a Winchester; that he was hired to protect the range, and he was not going to allow sheepmen on it. He threatened Hale's sheepherders, and told the two Duns that if they were Hale's men there would be some fighting done. He told William Orr, a sheepman, that he was there to hold that range, and that he was going to do it; that he did not allow sheepmen to go on there at all; that the first time a sheepman came there, there would be some shooting done; that he was working for the honor of holding that range, and not for the money there was in it; that the ridge between Big creek and Goose creek was the dead line. Defendant told Jabez Durfee, in the fall of 1895, that he did not allow any sheep in that country, and that he would kill the next sheepherder who crossed the ridge between Big creek and Goose creek. Said that he was just wishing that Bill Tolman, a sheepman, would come over; that he would like to make a target of him. Defendant also told Durfee that he wanted John Wilson (the deceased) to move right out over the ridge, and that, if he did not, there would be trouble. Defendant told William Cramer, late in the summer of 1895, that he was going to kill some one that summer, or that some one would kill him; that he would shoe his horse with rawhide, and that Jesus Christ could not track him. On November 16, 1895, defendant met said Tolman, who had never seen him before, and took a shot at him. It does not appear that the defendant was seen in that vicinity again until he appeared at the Middlestacks ranch, with Jack Gleason, on the twenty-seventh day of January, 1896, both armed with 38-caliber Winchester rifles, defendant with a 45-Colt's revolver, and Gleason with a 44-Colt's revolver. Both

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were practicing shooting, and cleaned their guns. Defendant was out of 45-cartridges, and was shooting 44-cartridges out of his 45-revolver. Defendant and Gleason went from the Middlestacks ranch to the Boar's Nest ranch, where the evidence shows them to have been on the 30th of January. At the Middlestacks ranch the defendant was wearing a light-colored canvas hunting coat, which he exchanged for a dark-colored coat; the defendant remarking at the time that the hunting coat that he had been wearing was too light, and could be seen too easily in the dark at night. Defendant and Gleason stayed at the Middlestacks ranch one day, and then went to the Boar's Nest ranch. On February 1, 1896, defendant and Gleason appeared at the Brown ranch, where they appeared to have remained until the morning of February 4th, with the exception of a few hours of February 2d. On the afternoon of February 2d, about 1 or 2 o'clock, the defendant and Gleason left the Brown ranch, armed with Winchester rifles and revolvers, and were gone until about 10 o'clock that night, when they returned. Defendant and Gleason remained at the Brown ranch on February 3d, and left there about sun-up—a little earlier or a little later—on the morning of the 4th. They were next seen at the Boar's Nest ranch somewhere between 1 and 3 o'clock in the afternoon of February 4th, where they claimed to have eaten their dinner in the absence of C. D. Edwards, the then keeper in charge of said ranch. Edwards testified that he ate dinner at the San Jacinto ranch that day, and returned to the Boar's Nest, and found defendant and Gleason. At the preliminary examination Edwards stated that defendant and Gleason were at the Boar's Nest ranch when he returned, about 2 or 3 o'clock. On the trial he stated it was 1 or 2 o'clock—nearer 1 than 2, he thought. From the Boar's Nest ranch the defendant and Gleason went to the Middlestacks ranch on the afternoon of February 4th, where they stayed all night. There defendant returned the dark-colored coat that he had been wearing, and received back the canvas hunting coat which could be seen too far at night. The said ranches all belong to the cattle company for which defendant and Gleason were working. There is some conflict in the evidence as to the exact distance

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between the points named, but the evidence shows the distances that are material to be as follows: From the Middlestacks ranch to the Boar's Nest, ten or twelve miles; from the Boar's Nest to Brown ranch, about eighteen miles; from the Brown ranch to the place of killing, from fifteen to eighteen miles; from the place of killing to the Boar's Nest ranch, from fifteen to twenty miles. One witness, C. D. Edwards, stated that the distance from the place of killing to the Boar's Nest was about fifteen miles. All of the points named are in Nevada, except the Brown ranch and the place where the homicide occurred, which are in Cassia county, Idaho. The evidence shows that the defendant and his companion, Gleason, were in the vicinity where the homicide occurred for seven or eight days; that they were feeding grain to their horses; that they were endeavoring to keep their presence in that vicinity known as little as possible, and then only to employees of the cattle company for whom they were working.

The evidence tends to show that the defendant and Gleason deliberately planned the murder of Wilson and Cummings, and that in so doing they were preparing to rely upon the defense of an alibi if charged with the crime, and the declarations of the defendant to the effect that he could prove an alibi strengthens and confirms this theory. The declarations and threats made by defendant against sheepmen generally, and the actions of defendant and Gleason, with all of the surrounding circumstances, point to them as the party or persons who attacked the Dunn sheep camp on the night of February 2, 1896; and the defendant admitted that he and Gleason were the parties who made that attack, but he claimed the honor of doing all of the shooting that was done by the attacking party. The circumstances, and actions of the defendant and Gleason, point to them, beyond any reasonable doubt, as the parties who attacked the camp of Wilson and Cummings on the morning of the 4th of February. After that the defendant told George Porter, a merchant at Deeth, Nevada, that he "is getting forty dollars a month for shooting sheepherders." Defendant remained away from Idaho until his arrest, but was at the Middlestacks ranch on the eighteenth day of February, when he told Frank Smith

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about the attack on the Dunn camp. Defendant said he was going to leave the country, and inquired as to how much money a man should have to leave with. The defendant was arrested at the penitentiary, at Yuma, Arizona, where he was going by the name of Frank Woodson. Among his acquaintances generally he seems to have gone by the name of "Diamondfield Jack."

The theory of the defense seems to be that of an alibi. There was an effort to show that the defendant and Gleason left the Brown ranch late in the morning, the defense striving to have the hour of departure to appear as late as possible. Then the defense strove to have the time of the arrival of the defendant and Gleason at the Boar's Nest to appear as early after noon as possible. Then the defense strove to show that it was not probable that the ride from the Brown ranch to the Boar's Nest, by way of the place of killing, could be made by men riding the kind of horses the defendant and Gleason were riding between the time they left the Brown ranch and the time they arrived at the Boar's Nest. There was much expert testimony adduced showing the speed at which horses could be ridden in February, 1896, in that locality. The evidence of the witnesses on the part of the prosecution on this point differs materially from that of the defense, and the witnesses for the latter do not agree among themselves. The speed at which defendant and Gleason could have ridden their horses, at the time in question varies, according to the witnesses, from three to twelve miles an hour. But the jury after hearing all of the evidence and seeing the witnesses, and noting their manner of testifying, decided that the defendant and Gleason could and did ride from the Brown ranch to the Boar's Nest, by way of the place where the deceased was killed, on the fourth day of February, 1896, between sunrise and 3 o'clock in the afternoon, or in less time, and the said conclusion is justified by the evidence. No attempt is made to show the whereabouts of the defendant and his companion, Gleason, on that memorable day, during the time intervening from their departure from the Brown ranch to their arrival at the Boar's Nest. The defendant did not testify on the trial. His traveling companion, Gleason, who was not jointly indicted or informed against with him, did not testify.

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No effort is made to show where they were at or about 9 o'clock of that morning. The jury—correctly, we think—concluded that the theory of the defense was not sustained by the evidence. The gist of the defense of alibi consists in showing that, at the time the crime was committed, the accused was at a place different from that where the crime occurred. Without showing that the defendant was at a different place when the crime of which he has been convicted occurred, the defense has endeavored to make it appear improbable that he was present at the time and place of the homicide in question. The verdict of the jury is sustained by the evidence.

The second error assigned by the defendant goes to the admissibility of the evidence showing that the defendant attacked the Dunn sheep camp on the night of February 2, 1896. For the reason that defendant was making war on a class of persons to which the said Duns and the deceased belonged, and for the purpose of proving motive on the part of the defendant, the said evidence was clearly admissible.

The third error assigned by the defendant goes to the admissibility of threats made by him generally against sheepmen. Under the circumstances of this case, evidence of such threats was admissible, and the action of the trial court in admitting such evidence, and in refusing to strike it out, was proper. (See citation of authorities in *State v. Larkins*, 5 Idaho, 200, decided by this court, and reported in 47 Pac. 946.)

The fourth error relied upon by the defendant is not tenable. The witness Dayley testified that while he was acting as a guard or assistant to the sheriff, and while on the road conveying the accused from Yuma, Arizona, the accused being under arrest on the charge involved in this case, said accused, without request so to do, and without any promise or threats having been made to him, of his own volition, stated to said witness that he (the accused) was first told by Mr. Bower on February 6th, 7th, or 8th of the killing of Wilson and Cummings. Said declaration was admissible on two grounds: 1. It tended to show, especially when it is considered that the crime was not discovered until February 16th, about ten days after the alleged conversation with Bower, guilty knowledge on the part of the defendant;

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and 2. It was contradictory of other statements made by the accused concerning the crime under consideration. It was not inadmissible because made to an officer who was in charge of the accused. No inducement was offered by said officer to the accused to get him to make the declaration. A confession or declaration tending to show guilt, made by an accused to an officer having him in custody, is admissible, if such confession or declaration was made freely and voluntarily, and without any inducement having been held out by the officer, or other person present, to the accused, by reason of which he is induced to make it, and there is no rule to the contrary laid down by this court in *State v. Mason*, 4 Idaho, 543, 43 Pac. 63, or in *State v. Crump*, 5 Idaho, 166, 47 Pac. 814.

The fifth, sixth, seventh, eighth, ninth, and tenth specifications of error are technical, and we think without merit. We think that all of the evidence sought to be excluded was competent; yet, if any of it was incompetent, we fail to see how it could affect any substantial right of the defendant. The defendant had a fair trial, was convicted, on sufficient evidence which pointed beyond reasonable doubt to the guilt of the defendant and his companion, Gleason, and excluded the probability of the crime having been committed by any other person or persons, and no error affecting the substantial rights of the defendant occurred during the trial.

As to the eleventh error specified, we think, after a full investigation, that the evidence disclosed by the affidavits on behalf of the defense is not such newly discovered evidence as entitled the defendant to a new trial. Said evidence is of the same character as that relied upon by the defendant, going to the improbability of persons riding from the Brown ranch to the place where the homicide occurred, and from there to the Boar's Nest, and from thence to the Middlestack's ranch, within the time that the defendant and Gleason must have made their ride on the 4th of February, 1896, and was to a great extent, at least, cumulative. Such evidence being in direct line with the whole theory of the defense, proper diligence required the defendant to produce such evidence at the trial. It was within his power to do so. A new trial was properly denied on this

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ground. A new trial should never be granted on the ground of newly discovered evidence when such evidence is merely cumulative, nor when the alleged newly discovered evidence was easily within the reach of the defendant, and could, with reasonable diligence, have been produced at the trial. To grant a new trial on such grounds would not be subservient to the public good, but would, on the other hand, encourage a careless and loose presentation by the defendant of his defense.

The twelfth specification of error is based upon the fact that the defendant procured and filed affidavits of parties to the effect that three of the jurors, G. W. Gray, Stephen Mahony and George Moore, had made statements prior to the trial, to the effect that they were of the opinion that the defendant was guilty and should be hung. On *voir dire* examination each of these jurors stated that they had no opinion, and had never formed or expressed an opinion, as to the guilt or innocence of the defendant. The prosecution filed a number of affidavits of parties who have known the said jurors for years, and said affiants deposed that said jurors are men of high standing in the community where they live, and that the general reputation of each of said jurors for truth and veracity among their neighbors and acquaintances is good. The jurors Gray and Mahony each made an affidavit in which he denies making any declaration to the effect that the defendant was guilty, prior to the trial. The juror George Moore appears to have left the county after the trial, and his affidavit was not filed. The supreme court of California has held that such a declaration by an individual juror prior to the trial, and which is denied by him on his *voir dire* examination, is not misconduct of the jury, and is not cause for new trial on the ground of misconduct of the jury. The grounds for a new trial are statutory. The grounds for a new trial in a criminal case provided by our code are found in section 7952 of the Revised Statutes, which is as follows: "When a verdict has been rendered against the defendant the court may, upon his application, grant a new trial in the following cases only: 1. When the trial has been had in his absence, if the indictment is for felony; 2. When the jury has received any evidence out of court other than that resulting

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from a view of the premises; 3. When the jury has separated without leave of the court after retiring to deliberate upon the verdict, or been guilty of any misconduct by which a fair and due consideration of the case has been prevented; 4. When the verdict has been decided by lot or by any means other than a fair expression of opinion on the part of all the jurors; 5. When the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial; 6. When the verdict is contrary to law or evidence; 7. When new evidence is discovered material to the defendant, and which he could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits the court may postpone the hearing of the motion for such length of time as, under all the circumstances of the case, may seem reasonable.”

The alleged declarations of said jurors, respectively, prior to the trial, to the effect that they thought the defendant guilty, do not appear to come under either of the grounds provided in the said statute; but, if it be admitted that such declarations do come within the meaning of either of the grounds provided by the said statute, then the showing is not sufficient. When we consider that the affidavits tending to show such declarations are hearsay evidence, based on the recollection of the affiants as to what was said in a conversation that occurred months before the affidavit was made, and which conversation was probably not fully understood, or misunderstood, or perhaps not remembered correctly, we think the impeaching affidavits insufficient to overcome the positive statements of the jurors, strengthened by the testimony of divers witnesses showing good reputation for truth and veracity on the part of the jurors. Experience teaches us that the memory of man is a frail thing, We hear a statement to-day, and to-morrow, perhaps, are unable to recall it in the exact language of the declarant. Then, again, by failing to catch one word of a sentence, we get an idea

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entirely different from that intended by the speaker. A simple illustration of this may be made as follows: A, in speaking of the accused, says: "If he is guilty, he should be hung." B, standing by, fails to hear the first word, and naturally gets this idea from what he hears the speaker say: "He is guilty; he should be hung." A has said nothing whatever showing that he entertains an opinion as to the guilt or innocence of the accused, although B honestly thinks he has. It becomes material afterward to determine whether A had expressed an opinion as to the guilt of the accused or not, and B testified that A did express such opinion, while A testifies that he did not. A repeats the language that he used, while B says: "If he used the word 'if,' I did not hear it." While the evidence of both A and B is, technically speaking, negative, yet it is palpable that the evidence of A is entitled to much more weight than that of B. It would be a dangerous practice to establish the rule that the verdict of a jury, which is fully sustained by the evidence, should be set aside on the ground that one or two *ex parte* affidavits are presented to the effect that one of the individual jurors had expressed an opinion prior to the trial to the effect that the accused is guilty, but which statement is denied by the juror, who is proven to be a man of good reputation for truth and veracity. In the absence of a statute providing such ground for a new trial, the court is not authorized to provide it by rule.

In regard to the thirteenth specification of error, we are inclined to the opinion that the trial court had authority to cause the witness Addie Gordon to be brought before it, and compelled to testify; yet inasmuch as the statement which it is claimed she would have made, would not, for the reasons heretofore given, entitle the defendant to a new trial, the refusal of the trial court to cause said witness to appear before it did not prejudice any substantial right of the defendant.

The fourteenth and fifteenth specifications of error question the correctness of the action of the trial court in receiving and considering affidavits offered by the prosecution to rebut the affidavits offered by the defendant on the hearing of his motion for new trial. While we think that such action is largely a matter of discretion on the part of the trial court, yet, owing to

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our conclusion that the showing made by the defendant did not, *prima facie*, entitle him to a new trial, it is not necessary to decide the correctness of the action of the trial court in receiving and considering such rebutting affidavits. A new trial was properly denied the defendant.

While a number of minor questions are raised by the able brief of the counsel for the defendant, which have not been specially noticed in this opinion, yet we have carefully considered all of them, and have specially noticed those questions that we deem necessary to consider to arrive at a correct conclusion in this case. The judgment and the order denying the defendant a new trial are affirmed.

Sullivan, C. J., and Huston, J., concur.

ON REHEARING.

(July 13, 1898.)

Per CURIAM.—The petition for rehearing, although quite voluminous, presents nothing new. No questions arising upon the evidence, or the law applicable thereto, which have not heretofore been fully considered and passed upon, appear in the petition; and, as we have already expended much time in a careful and laborious examination of the record and the briefs of counsel in this case, we are confident that a repetition of our labor would serve no other purpose than delay. Rehearing denied.

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Statement of Facts.

(September 22, 1898.)

WILSON v. PERRAULT.

[54 Pac. 617.]

WRIT OF MANDATE—WATER FOR IRRIGATION—MAXIMUM RATE FOR—CONSTITUTION LAW—POWER OF LEGISLATURE.—Under the provisions of section 6, article 15, state constitution, the legislature is prohibited from fixing reasonable maximum rates to be charged for water under sale or rental. Said section commands the legislature to provide, by law, the manner in which such rates may be established, and by necessary implication prohibits the legislature from fixing such rates.

(Syllabus by the court.)

Original proceeding for writ of mandate.

A. A. Fraser, E. J. Dockery and J. H. Richards, for Plaintiff.

No brief filed.

Fremont Wood and Edgar Wilson, for Defendants.

No brief filed.

This is an application for a writ of mandate to compel the defendants to furnish the plaintiff one cubic foot of water per second of time, continuous flow, from a certain irrigating ditch owned by the defendants. The facts, as alleged in the affidavit for the writ, are substantially as follows: That the plaintiff is the owner of fifty and six one-hundredths acres of land, situated in Ada county; that said land is desert in character, and requires artificial irrigation to render the same susceptible of cultivation, and, when so irrigated and supplied with water, is of great value, to wit, the sum of \$30,000, and without such irrigation would be of no value whatever; that there is no means of procuring water for the irrigation of said land other than through the ditch owned by said defendants; that for a period of about fifteen years said land had been irrigated by water from said ditch under sale, rental, and distribution for hire; that by means of the water so acquired the plaintiff had placed said land in a high state of cultivation, by planting and cultivating

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thereon an orchard of fruit-bearing trees; that without the water from said ditch said orchard will be totally destroyed. Then follows allegations of the ownership of said ditch and a certain water right in defendants, and that the said ditch was operated, and the said water diverted, for the purpose of irrigation and domestic use; that said water had been used in the irrigation and cultivation of lands lying under said ditch, including the land aforesaid, by way of rental and sale; that on the twelfth day of August, 1898, the defendants shut off the water, and refused to permit the plaintiff to use any of said water, for the irrigation of said land, unless the plaintiff paid \$200 therefor for the season of 1898; that it requires one cubic foot per second, continuous flow, of said water for the proper irrigation of said land; that demand had been made for said water, and that the plaintiff had tendered to defendants the sum of sixty-two dollars and fifty cents for the water so demanded, which sum was the maximum rate for the use of water fixed by an act of the legislature approved March 8, 1897; that said defendants refused to accept said offer, and also refused to permit the plaintiff to use any water from said ditch unless he first paid the sum of \$200 for the use thereof. The petition contains other allegations, not necessary to a determination of this case. To the complaint the defendants demurred generally and also answered. Thereupon the plaintiff demurred to the answer, and the case was heard upon the demurrers.

SULLIVAN, C. J. (After Stating the Facts.)—Counsel for defendants contend that the act of the legislature on which the plaintiff relies is unconstitutional, in that it contravenes the provisions of section 6 of article 15 of the state constitution. Said act is entitled "An act to establish a uniform price for the use of water under a sale, rental, or distribution." (See Sess. Laws 1897, p. 52.) Said act provides, *inter alia*, that it shall be unlawful to charge a higher price than sixty-two dollars and fifty cents per cubic foot per second, continuous flow, for water for any irrigating season. Said section 6 of article 15 of the state constitution is as follows: "The legislature shall provide by law the manner in which reasonable maximum rates may be

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established to be charged for the use of water sold, rented or distributed for any useful or beneficial purpose." Said section of the constitution commands the legislature to provide by law the method or manner by which reasonable maximum rates for water may be established. Said act, *supra*, was not passed with a view of carrying out the provisions of said section of the constitution. No attempt is made in said act to provide the manner in which reasonable maximum rates may be established. It absolutely establishes the maximum rate at sixty-two dollars and fifty cents per cubic foot per second, continuous flow, for an irrigating season, for all ditches and canals in the state. It is a well-established rule that a state legislature has plenary power over all subjects of legislation not prohibited by the federal or state constitution, and, unless the fixing of maximum rates that may be charged for water is prohibited by the constitution, the legislature had the power to establish such rates. Prohibitions are either express or implied. It is contended by counsel for the defendants that, as the provisions of section 6 of the state constitution command the legislature to provide by law the manner in which reasonable maximum rates may be established for the use of water, it contains an implied prohibition on the legislature from absolutely fixing such rates. The framers of the constitution in preparing said section 6, and the people in adopting it, evidently intended that it should have some force and effect. If the legislature can refuse to provide by law the manner in which maximum rates for water may be established as commanded by said section, and proceed as it may deem best, and absolutely fix such rates, then said section of the constitution amounts to nothing and has no force or effect. Said section 6 would not have been inserted in the constitution had it been intended that the legislature should fix water rates. Without it the legislature had the power to fix reasonable maximum rates. By it the legislature is commanded to provide by law the manner in which reasonable maximum rates may be fixed or established, and by necessary implication prohibited from fixing or establishing such rates itself. Every provision of the constitution must, if possible, be given force and effect, and to hold that the legislature need not provide by law the manner in

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which maximum rates may be established is to hold that said section means nothing, and that the legislature is at liberty to disregard its command. An act was passed by the third state legislature (see Sess. Laws 1895, p. 175) providing the manner in which reasonable maximum rates might be fixed. It authorizes the district court to fix reasonable maximum rates of compensation for the use of water, after due notice and trial, in which all interested parties are entitled to a hearing. Said act was passed with a view of complying with the provisions of said section 6 of the constitution. The act of 1897, *supra*, contains no repealing clause, and does not repeal the act of 1895, *supra*. By the act of 1895, the third state legislature undertook to carry into effect the provisions of said section 6 of the constitution but the fourth legislature, without directly repealing the said act of the third legislature, attempts to render it of no effect by absolutely fixing a maximum rate to be applied to every canal in the state. Some canal companies can furnish water for much less than others, and still make a reasonable profit on their investment. A rate that would pay a reasonable profit on the investment in one canal would be confiscation for another. No state can deprive a person of his property without due process of law. The framers of the constitution had in view, when drafting said section 6, a plan whereby a reasonable maximum rate might be established for each canal. They were men of intelligence, and knew that no one maximum rate could be established that would do even-handed justice to all ditch owners and all water consumers. What would be a fair rate to consumers under one canal might be extortion to the consumers under another canal, and what would be a fair rate to the owners of one canal might be confiscation to the owners of another. The framers of the constitution recognized these facts, and by the provisions of said section 6 provided a plan whereby the conditions actually existing might be fairly met, and no injustice be done to the canal owner or the consumer of water. Said section clearly shows that the framers of the constitution recognized the fact that any one maximum rate could not justly apply to all parts of the state and all canals or ditches. They therefore, in framing said section 6, declare that the legislature

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shall provide the manner in which reasonable maximum "rates," not "rate," may be established. Had they intended that a single rate should or could be made applicable to all ditches and canals, the word "rate" would have been used, and not the plural, "rates." It is thus clearly shown that the framers of the constitution understood the conditions existing in the state, and provided for the establishment of a reasonable maximum rate for each locality or each canal, as the facts in each case would warrant, and thus do justice as nearly as possible to the owners of the ditches and canals, and to the consumers of water thereunder.

It is conceded by counsel for plaintiff that, if the rate fixed by the legislature would result in confiscation of any canal, the rate so fixed would be void as to such canal, as the fourteenth amendment to the federal constitution prohibits the taking of private property without due process of law. That admission shows the utter inutility of the legislature in attempting to fix one reasonable maximum rate to be charged for water, to be applied to all canals and ditches in the state. A rate that would give a reasonable profit to the owners of one canal might not pay any profit to the owners of another and different canal, and the rate to one consumer might be just, and the same rate extortionate when applied to a consumer of water from a different canal. The state cannot compel canal owners to furnish water to consumers without some reward; neither can it do that which in law amounts to the taking of private property for public use without just compensation or without due process of law. (*Reagan v. Trust Co.*, 154 U. S. 362, 14 Sup. Ct. Rep. 1047; *Railway Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. Rep. 484.) In order to establish a reasonable maximum rate that would be just to both the owner and consumer of water, certain facts must be known. Among them the cost of the canal, the annual cost of maintenance of the canal or ditch, and all necessary expenses connected therewith, and the amount of land that may be irrigated from such canal, etc. Thus, it is shown that many facts must be known to intelligently establish a reasonable maximum rate for water—one that would be just to the owner of the canal and the consumer of the water. And without these facts the legislature

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or any other tribunal could not establish such rates. The framers of the constitution knew that it was an impossibility for the legislature to ascertain all facts necessary to establish a just maximum rate under each ditch or canal system in the state during sessions of the legislature limited to sixty days, and biennial sessions at that; and said section 6 of article 15 of the constitution was framed with a view of requiring the legislature to provide by law the manner in which reasonable maximum rates might be ascertained and established. It is thus shown that it would be impracticable, if not impossible, for the legislature to ascertain the facts necessary to be known in order to establish a reasonable maximum rate under each canal system or ditch in the state at its biennial sessions of sixty days. So the constitution, by the provision of said section 6 of the state constitution, prohibits the legislature from fixing such rates, and commanded it to provide the manner or method in which or by which such rates can be intelligently and justly established. The conclusion reached is that the provisions of said section 6 of article 15 of the state constitution, by necessary implication, prohibit the legislature from passing the act in question, and that said act wherein the legislature attempts to fix the reasonable maximum rate to be charged for the use of water is unconstitutional and void. The demurrer to the petition is sustained. The alternative writ of mandate heretofore issued is quashed, and a peremptory writ denied. Costs of this proceeding are awarded to the defendants.

Huston and Quarles, JJ., concur.

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(October 1, 1898.)

WILLIAMS v. LEWIS, SECRETARY OF STATE.

[54 Pac. 619.]

WRIT OF MANDATE—SECRETARY OF STATE.—Writ of mandate is the proper proceeding to compel the Secretary of State to file and certify a ticket entitled to filing and certification by such officer.

WRIT OF PROHIBITION—SECRETARY OF STATE.—Writ of prohibition, under the statutes of Idaho, will lie to restrain the action of a ministerial officer, when it appears that such action is illegal and beyond his jurisdiction as the Secretary of State in certifying to the county auditors a ticket not entitled to be certified.

RIVAL CONVENTIONS—SAME PARTY—OFFICIAL BALLOT—WHO ENTITLED TO.—Where a contention between two conventions of the same party arises as to which is entitled to have the ticket nominated by it placed upon the official ballot under the recognized party name, *held*, that the convention called by the regular state central committee of the party is entitled to have the ticket nominated by it placed upon the official ballot under the party name or designation.

OFFICIAL BALLOT—ONLY ONE TICKET OF SAME PARTY.—Under the statutes of Idaho only one ticket under the recognized name or designation of a political party is entitled to be placed upon the official ballot.

(Syllabus by the court.)

Original proceedings for writ of mandate and writ of prohibition.

N. M. Ruick, for Plaintiff.

No brief filed.

T. J. Jones, S. B. Kingsbury and George M. Parsons, for Defendant.

No brief found on file.

Per CURIAM.—Plaintiff petitions for a writ of mandate to the Secretary of State, commanding him to file and certify to the various county auditors of the state a certain ticket containing, as is alleged in the petition, the names of the

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candidates for the various state offices and member of Congress to be elected at the coming biennial election in November next, nominated by the People's Party, at a convention of said party regularly called and held at Boise City, on August 24, 1898, and which ticket, it is alleged, the said Secretary of State refuses to either file or certify as requested. Plaintiff is named on said ticket as the candidate for the office of lieutenant-governor. At the same time, plaintiff files a petition for a writ of prohibition to the Secretary of State, commanding him not to certify to said county auditors a certain other ticket, heretofore filed with him, and purporting, as is alleged in said petition, to contain the names of the candidates for the various state offices and member of Congress, as aforesaid, nominated by the People's Party. To both petitions defendant files a general demurrer and motions to quash.

It will be seen that here are two sections or factions of one party, or two distinct parties under the same name or designation, to wit, the "People's Party," claiming the right to have their several tickets filed and certified and placed upon the official ballot as the ticket of the "People's Party." It is conceded that under our statutes but one of said tickets is entitled to a place upon the official ballot. It is contended by defendant that, he having already filed one ticket under the name and designation of the "People's Party" ticket he cannot be required to file another under the same name or designation. In making this contention at this time, counsel is anticipating a condition which is not before the court. Upon the petition for writ of mandate, we are considering a demurrer to the complaints or petitions, and it does not appear therefrom that any ticket has been filed or certified. The only question before the court at this time is, Do the complaints state facts sufficient to constitute a cause of action? The object and purpose of the election law was and is to protect the purity of the ballot, to protect the citizen in the exercise of the elective franchise from fraud, deception, compulsion or intimidation; and in securing that right, we think it is proper for the citizen to invoke the aid of the courts.

Political parties are a necessary incident to popular government, and they have found recognition in the statute; and any

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attempt to deprive them of the rights secured to them by law entitles them to invoke the protection of the courts. If, therefore, a "convention or primary meeting representing a political party or principle" has put in nomination a ticket, naming therein the candidates of such party to be voted for at an ensuing election, it is *prima facie* entitled to have such ticket filed and duly certified by the Secretary of State, upon presentation to him as required by law. The complaint, we think, sets forth a case entitling the petitioner to the relief sought by mandate. The objection of counsel for defendant that *mandamus* is not the proper remedy we do not think well taken. The demurrer to the petition for writ of mandate is overruled.

The demurrer to the complaint for a writ of prohibition is urged upon the ground that such writ is sought to prevent or prohibit the act of an official purely ministerial in its character; and this contention is supported by several decisions of the supreme court of California, from which state our statute upon the subject was taken. The purpose of the common-law writ of prohibition was to suspend or stop the action of an inferior judicial tribunal, when such tribunal was acting or contemplated acting beyond its jurisdiction. The authorities hold that the common-law writ of prohibition will not lie to prohibit an act that is purely ministerial. We think, however, there is a distinction between the California conditions and those of Idaho. By section 1866 of the Revised Statutes of the United States it is provided that the jurisdiction of the courts provided for in sections 1907 and 1908 (U. S. Rev. Stats.), both original and appellate, shall be limited by law. By the Revised Statutes of Idaho of 1887 (section 3816), while Idaho was still a territory, it is provided that the original jurisdiction of the supreme court extends to the issuance of writs of mandate, review, prohibition, *habeas corpus*, and all writs necessary to the exercise of its appellate jurisdiction. Section 4994 of the Revised Statutes of Idaho of 1887 is as follows: "The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board or person when such proceedings are without, or in excess of, the jurisdiction of such tribunal, corporation, board or person." Sec-

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tion 4995: "It may be issued by any court except probate or justices' courts, to an inferior tribunal, or to a corporation, board or person, in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law." By section 1851 of the Revised Statutes of the United States, the legislative power of the territories was declared to extend to all rightful subjects of legislation, and not inconsistent with the constitution and laws of the United States. The defining of the functions of the writ of prohibition was a rightful subject of legislation. The original jurisdiction of the supreme court of the state is defined in section 9 of article 5 of the constitution in almost the exact words of section 3816 of the Revised Statutes of Idaho. The men who formulated the constitution were familiar with the provisions of the statute. The supreme court of California (*Camron v. Kenfield*, 57 Cal. 550) says: "The new constitution was framed in view of the construction of the language used in the former constitution, unanimously concurred in by the members of the highest tribunal of the state; yet the framers of the present constitution repeated the words employed in the former. We are forced to the conclusion that they used these words in the sense which had been attributed to them by the supreme court." We may conclude with equal confidence that the framers of the constitution of Idaho, in defining the functions of the writ of prohibition, did so with a full knowledge of the character and functions of the writ, as the same were defined in the statutes of Idaho, then existing, and which had been in force in the territory of Idaho for fifteen years at least prior to the adoption of the constitution. While it is true there had been no consideration of the question by the supreme court of the territory, we think it may reasonably be presumed that the members of the constitutional convention were as well advised as to the general legislation of the territory as they were to the decisions of its supreme court. The constitution expressly continues in force all laws of the territory which are not repugnant to the constitution. It will hardly be contended, we apprehend, that the provisions of sections 4994 and 4995 are repugnant to the constitution. As the law defining the functions of the writ of prohibition preceded the constitution by some

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fifteen years, and such law was continued in force by express provision of the constitution, we are, as expressed by the supreme court of California, "forced to the conclusion" that, in providing for the issuance of the writ of prohibition in section 9 of article 5 of the constitution, they intended the writ then existing under the laws of the territory, and with the functions therein declared and defined.

Accepting the statements in the complaint as true, which we must do in considering the demurrer, it is clear that the defendant is about to do an act beyond his jurisdiction. The plaintiff has no plain, speedy, and adequate remedy in the ordinary course of law, and this is one of the contingencies provided for in the statute when the writ of prohibition will lie. The recognition of the rule, "*Prior tempore, prior jure*," contended for by counsel for defendant, would not only open the door to fraud, but would operate as a negation of all the rights of parties and electors, which, it is conceded, it is the intent and purpose of the law to protect. The statute, by its language, clearly intended that the writ of prohibition should extend to ministerial acts; otherwise, the language used in sections 4994 and 4995 would not have been employed; and, in continuing these sections of the statute in force, it seems plain to us that it was intended to recognize the definition of the writ and its functions as set forth in said sections.

For the foregoing reasons, the demurrer to the petition for a writ of mandate is overruled, the demurrer to the petition for a writ of prohibition is overruled, and the motions to quash the alternative writs, in each case, are denied. The defendants answered both of the said petitions. The parties then filed a statement of agreed facts, and both of these proceedings are now before us for consideration upon the merits. By the stipulation of facts, all of the details leading up to the holding and conduct of each of the two conventions that made the certificates of nominations in question here are set forth fully. We will simply enumerate those facts only which in our opinion are necessary to a determination of the controversy.

The state nominating convention of the People's Party in the state of Idaho, which was held at Boise City in August, 1896,

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elected and created a state central committee of said party, which thereupon organized and elected P. H. Blake, one of the committee, chairman, and said Blake appointed M. H. Jacobs secretary of said committee; and said state central committee selected an executive committee from said state central committeemen consisting of four, of which said chairman, P. H. Blake, was one. On February 22, 1898, said Blake, as chairman of said state central committee, issued a call for a meeting of said committee, in pursuance to which call a meeting of said committee was held at Boise, on March 22, 1898, at which meeting eleven of the twenty members of the committee (the same being a majority) were present in person or by proxy. Said committee consisted of one member from twenty counties in the state; one county, Oneida, not being represented on the committee. At said meeting, the committee fixed the time and place for holding the state nominating convention, at Moscow, on August 8, 1898, and instructed P. H. Blake, as chairman, to issue a call for a state nominating convention of the People's Party to be held at said time and place, which call was issued by said P. H. Blake as chairman, and which call was duly published. On the twenty-fifth day of June, 1898, the said P. H. Blake, chairman of said committee, requested, by writing, that said M. H. Jacobs resign his position as secretary, and turn over the keys of the said chairman's office, with the books and records of the party and committees, to one Frank Walton, July 4, 1898. Said Jacobs refused to comply with said request, and, as secretary of said committee, issued a call for a meeting to be held at Boise City on the sixteenth day of July, 1898, at which time and place eighteen members of said committee met, either in person or by proxy, and there and then passed a resolution changing the time and place for holding the state nominating convention of the People's Party from Moscow to Boise, and from August 8 to August 24, 1898, the vote standing eleven for the resolution and seven against. At said last committee meeting, said committee removed the said P. H. Blake by a majority vote, and selected one W. H. Taylor, who was not a member of said committee, but present and acting as proxy for a member of the committee, chairman of the said committee. Pursuant to the resolution

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changing the time and place for holding said state nominating convention, a call, giving due notice thereof, was issued by the said W. H. Taylor as chairman, and the said M. H. Jacobs as secretary, and duly published. Afterward and on July 4, 1898, P. H. Blake, who, notwithstanding the action of said committee in removing him, still claimed to be chairman of said state central committee, issued a paper, the heading to which is in the following words: "Proclamation to Populists. The Moscow Convention Called Off and Delegates Ordered to Meet in Boise, August 24." But, notwithstanding this proclamation, fourteen delegates from three counties met at Moscow on the eighth day of August, 1898, and effected a temporary organization, by the election of said P. H. Blake as temporary chairman, and Clay McNamee as secretary. The said convention or meeting then adjourned to meet at Boise, August 24, 1898, without attempting to perfect a permanent organization, giving as a reason therefor that no quorum was present. A minority of the state central committee, consisting of seven, including the proxy of said P. H. Blake, who voted against changing the time and place for holding the state nominating convention, and who voted against deposing said Blake as chairman of said committee, repudiated the action of said committee, refused to recognize the call for the convention to be held at Boise, August 24th, signed by W. H. Taylor as chairman, and insisted that the first call, or the one signed by P. H. Blake as chairman, was the regular and legitimate call for the state nominating convention of the People's Party. The reason given by said committee for deposing P. H. Blake as chairman, as shown by the resolution, was that he was not accessible to the said committee for the transaction of necessary business. The stipulation of facts show that said P. H. Blake had been absent from Boise City, where the office, books and records of said committee and of the said party were, from the seventeenth day of May, 1898, up to the sixteenth day of July, 1898. It is also agreed in the stipulation of facts that prior to the call for the state convention issued pursuant to the resolution passed by the state central committee as aforesaid, issued by said Taylor as chairman, sixty-five delegates from nine counties had been selected under the

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Blake call for the convention to be held at Moscow, August 8, 1898. August 24, 1898, delegates who had been selected in different counties from the ranks of the People's Party assembled at Boise City, some of them selected or claiming to have been selected under the call signed by P. H. Blake, and others claiming to have been selected under the call signed by W. H. Taylor. Those claiming to have been selected under the Blake call met in the building known as G. A. R. Hall, and proceeded to effect an organization by electing George F. Moore, temporary chairman, and Augustine M. Sinnot temporary secretary, which temporary organization was afterward made permanent. Those claiming to have been selected under the call signed by W. H. Taylor met at McCarty Hall, in Boise, on August 24, 1898, and organized by selecting Joseph F. Bonham temporary chairman, and Daniel H. Kerfoot temporary secretary, and thereafter effected a permanent organization of said convention by the election of Presly M. Bruner as chairman, and Arthur H. Wilkie and Henry A. Griffiths as secretaries; there being present at this convention, either in person or by proxy, seventy-three delegates from thirteen counties in the state, claiming to represent the People's Party of the state of Idaho. Each of these two conventions remained in session from August 24th to the 27th, inclusive. Each nominated a state ticket, the nominations being certified by the respective chairman and secretaries, such certificates of nominations being those in question here. During the sitting of these conventions, twenty-two of the seventy-three delegates in what is called the "Taylor Convention" seceded, and went over and participated in what is called the "Blake Convention." The ticket nominated by what is called the "Blake Convention" was filed by the defendant Secretary of State, who threatens to certify the nominations therein made to the various county auditors of the state. The ticket nominated by what is called the "Taylor Convention" was duly certified and presented by one of the secretaries of said convention for filing and certification to the county auditors; but the defendant, as said secretary, fails and refuses to file said certificate, and further fails and refuses to certify the nominations therein made to the several county auditors of the state, as required

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by law. Both of said certificates of nomination are regular on their face, and in form comply with the requirements of our election statute, and both of said certificates purport to have been made by a convention of the People's Party.

Many of the questions presented by the record relate to the government of political parties, and are to be controlled by such a party, either through meetings of the people composing the party, through conventions composed of delegates selected by the party, or through committees selected by such meetings or conventions, in the absence of statutory provisions relating thereto, and not by rule adopted by courts. This court feels unauthorized to prescribe the rules to be followed by the committees of the different political parties in the state regulating the conduct of such committees in calling state nominating conventions; and we must assuredly feel unauthorized to say whether such committees shall be presided over by a chairman selected from the committee or not, or to say whether the secretary of such committee has authority to call a meeting of such committee or not; and we deem it unnecessary to decide whether M. H. Jacobs was, or was not, secretary of the state central committee of the People's Party of the state of Idaho on the sixteenth day of August, 1898.

What is known as the "Australian Ballot System" has been adopted in this state, but in many respects our election statutes are crude and imperfect. The primary object of this system is to protect the voter from coercion, oppression, fraud and deceit, and to permit him in the privacy of his voting booth to exercise his own judgment, untrammelled by the will or dictation of others, and to vote for those party tickets, or for those individual candidates on various tickets, as he may deem consonant with his country's good, and in line with his duty as a good citizen. In furtherance of this beneficent object, our election statutes, taken as a whole, and construed together, clearly intend that each organized political party in the state may be represented upon the official ballot by having under its party name one ticket for the various officers to be selected at any given election, but that no political party should have more than one such ticket on the official ballot under its party name. Further

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than this, it is provided by statute that any primary meeting or convention representing a political principle, as distinguished from a political party which represents a general policy embracing numerous political principles, may be nominated by a primary meeting or convention, or by petition setting forth the names, occupation, and residence of the various candidates, and designating in not more than five words the principle represented by such primary meeting, convention or petition. It will thus be seen that it is the intention of the law to give to each individual voter the opportunity of voting for any ticket presented by a political party, or presented by electors representing not a political party, but some political principle. The law then provides for party tickets, and for independent tickets representing some distinctive principle. The latter class of tickets is not involved in this controversy. This controversy is over two tickets, each of which claims to represent the same political party. It does not require much consideration, or the exercise of anything other than common sense, to reach the inevitable conclusion that a political party cannot exist without organization. It is a matter of general knowledge that all political parties have their organizations, usually, as in this state, headed by a state central committee, selected by the preceding state convention of the party. As between the two tickets in controversy here, one of them represents the organization of the People's Party, and the other does not. It is our duty to determine from the record before us which one of the tickets in controversy was nominated by a convention called by the state central committee of the People's Party for the state of Idaho.

A careful consideration of the facts presented in this record convinces us that the ticket in which the name of the plaintiff appears as a candidate for lieutenant governor, nominated by the convention presided over by Presly M. Bruner as chairman, is the convention which is entitled to recognition as the convention of the organized People's Party of the state of Idaho. It met pursuant to the call of the state central committee of the People's Party. It was called to order by acting chairman W. H. Taylor, of said state central committee. It was recognized by a majority of said committee. Whether said Taylor

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was chairman *de jure* or *de facto* is unnecessary for us to determine. It is sufficient to say that said committee recognized him as its chairman, and he acted as such. It is self-evident that, the organized People's Party of the state having reposed in its state central committee authority to fix a time and place for the holding of a state nominating convention, such committee would necessarily be invested with the power to change such time and place; otherwise if the committee has acted injudiciously, and has fixed a time and place which would be detrimental to the best interests of the party, it would be powerless to change such time and place. In the case at bar, the committee which fixed Moscow and August 8, 1898, as the time and place for holding the state nominating convention, determined that it would be to the best interests of the People's Party to change the time and place of holding the convention to Boise, and on August 24th; and such committee made such change twenty-five days before the Moscow convention was to have been held, and thirty-nine days before the state nominating convention was held, due notice of which time was given by the acting chairman and secretary of the state central committee. The minority of the committee, including P. H. Blake and their followers, who rebelled against the action of the state central committee, and who held a separate convention, must be regarded as bolters from the regular People's Party convention. That the convention presided over by George F. Moore had the right to nominate a ticket which would be entitled to a place on the official ballot is unquestioned and undisputed, but that it could nominate a ticket represented by the organized People's Party of this state, which would be entitled to a place upon the official ballot, to the exclusion of the ticket nominated by the convention held under the call of the state central committee, and recognized by such committee, is not only questioned, but does not exist. If there can be two tickets under the name of any political party in this state, then there can be two hundred under the same name, or as many as there may be factions in any given political party. In a state like this, covering a large area, whose population is being increased from year to year by immigration, it is necessarily true that many voters are acquainted with the

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individual candidates upon the various tickets. Such voters would be denied that protection against deception contemplated by our election laws if numerous tickets on their face claiming to represent the same political party are placed upon the official ballot. The ticket nominated by the Blake convention should select some name or designate some principle which would distinguish it from the ticket nominated by the People's Party convention. In the form in which it is presented, the ticket nominated by what is called the "Blake Convention" is not entitled to a place upon the official ballot. The Secretary of State has no authority to certify the nominations therein contained to the several county auditors of the state, but it is his duty to file the certificate of nomination made by the convention presided over by Presly M. Bruner, as chairman, and to certify the same to the several county auditors of the state, as required by the statute in such cases made and provided.

A peremptory writ of mandate directing and requiring the defendant, George J. Lewis, as Secretary of State, to file the certificate of nomination made by the convention presided over by Presly M. Bruner, as chairman, and described in the petition for a writ of mandate, and requiring said defendant, as Secretary of State, to certify the nominations shown to have been made in such certificate to the several county auditors of the state, must issue in the proceeding for a writ of mandate, and costs of such proceeding are awarded to the plaintiff. The peremptory writ of prohibition prohibiting the defendant, as Secretary of State, from certifying to the several county auditors of the state the nominations shown to have been made by the convention presided over by George F. Moore, by the certificate of nominations heretofore filed by said defendant, as Secretary of State, under the name of the People's Party, must issue. Costs of this proceeding is awarded to the plaintiff. Let judgment be entered in each of these proceedings accordingly.

Argument for Appellant.

(October 25, 1898.)

BEAR TRACK MINING COMPANY v. CLARK.

[54 Pac. 1007.]

CONTRACT—SPECIFIC PERFORMANCE.—A party to a contract, in order to obtain judgment for the specific performance of the contract, must show that such contract is fair, complete, mutual, reasonable and based upon an adequate consideration.

SAME—WHEN WILL NOT BE ENFORCED.—A contract by which C., the owner of a one-half interest in a mining claim, agreed to convey such interest to M., solely in consideration of the doing of certain development work on said mining claim by M., is neither fair, mutual, reasonable, nor based on an adequate consideration, and cannot be enforced by judicial decree.

(Syllabus by the court.)

APPEAL from District Court, Idaho County.

James E. Babb, for Appellant.

The written contract between the parties dated November 22, 1895, specified no time for performance by Moore. Therefore the law required performance within a reasonable time (19 Am. & Eng. Ency. of Law, 1990), and the contract cannot be contradicted by evidence that the parties agreed on a specific time. (*Cocker v. Franklin Hemp Flax Mfg. Co.*, 3 Sum. 530, Fed. Cas. No. 2932, per Story, J., and cases cited; 19 Am. & Eng. Ency. of Law, 1090, 1091; 1 Greenleaf on Evidence, 14th ed., sec. 275.) The contract, not the evidence of the contract, but the contract itself, if there was one, is so uncertain in its terms and provisions as to preclude the court from decreeing its specific performance. We contend that by the contract as written and signed by the parties November 22, 1895, that its failure to specify or fix any time for performance created such uncertainty as would preclude the entry of a decree of specific performance. (*Gates v. Gamble*, 53 Mich. 181, 18 N. W. 631; *Potts v. Whitehead*, 20 N. J. Eq. 55; *Schmelling v. Kriesel*, 45 Wis. 325; *Williams v. Stewart*, 25 Minn. 516; *Diamond State Iron Co. v. Todd* (Del.), 14 Atl. 27; *Edichal Bullion Co. v.*

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Columbia Gold Min. Co., 87 Va. 641, 13 S. E. 100; *Oxford v. Crow*, 3 Ch. 535 (Eng.) 1893; 22 Am. & Eng. Ency. of Law, 1006; *Tribune Co. v. Associated Press*, 83 Fed. 350; *Miller v. Morley Finishing Machine Co.*, 87 Fed. 621.) In respect of time of performance of a contract to acquire title to a mine, or an interest in a mine, it has been held by the supreme court of Idaho, that time is of the essence. (*Durrant v. Comegys*, 3 Idaho, 204, 28 Pac. 425; *Seattle v. Winters*, 2 Idaho, 215, 10 Pac. 216.)

Forney, Smith & Moore, for Respondent.

Respondent, in addition to discussing the points made by appellant, in his brief, presents the following points and authorities: 1. A mining claim perfected under the law, is property in the highest sense of that term, which may be sold, and conveyed, and will pass by descent and is real property. (Idaho Rev. Stats., sec. 16, subd. 2; *Ah Kle v. McLean*, 3 Idaho, 538, 32 Pac. 200.) 2. Courts have the power to compel the specific performance of an oral contract for the conveyance of real property, in case of part performance thereof. (Idaho Rev. Stats., secs. 6007, 6008; *Hunt v. Hayt*, 10 Colo. 278, 15 Pac. 410; *Day v. Cohn*, 65 Cal. 508, 4 Pac. 511; *Foster v. Maginnis*, 89 Cal. 264, 26 Pac. 828; *Flickenger v. Shaw*, 87 Cal. 126, 22 Am. St. Rep. 234, 25 Pac. 268; *Tohler v. Folsom*, 1 Cal. 207; *Augualle v. Ettinger*, 10 Cal. 150.) 3. The assignee of a party named in an oral contract for the conveyance of land may maintain an action for the specific performance of the contract against the grantor, where the right is based upon or the right is acquired by part performance of the contract. (*Owen v. Frink*, 24 Cal. 171; Idaho Rev. Stats., sec. 2891; *Calanchini v. Branstetter*, 84 Cal. 250, 24 Pac. 149.)

QUARLES, J.—This action was commenced by the plaintiff, a corporation, as assignee of one H. K. Moore, to obtain a decree for specific performance of a contract relating to the conveyance of an undivided one-half interest in and to a certain unpatented mining claim. The description of the property and the allegations of the contract are contained in paragraphs 2

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and 3 of the complaint, in the following words, to wit: "That on the twenty-second day of November, 1895, the defendant was the owner of, and in the possession of, an undivided one-half interest in and to the following described property, situated in Idaho county, state of Idaho, to wit: 'That certain quartz claim located in Bear Track gulch, in the Florence mining district, Idaho county, state of Idaho, known as, and commonly called, the "Bear Track Claim," as located by one Christopher Arnold, on the seventeenth day of February, 1886, the same being situated about two and one-half miles northeast of the old town of Florence, in said county and state.' That on the twenty-second day of November, 1895, the said defendant and one H. K. Moore entered into an agreement or contract whereby the said H. K. Moore promised and agreed to and with the said defendant to do certain development work on the 'Bear Track Quartz Claim,' in Florence, Idaho, during the year 1896, which said development work consisted in sinking ten feet of shaft at the bottom of a certain shaft then upon said claim, and drifting twenty feet on the vein or lode from any point in said shaft thirty feet or more below the surface of the ground at the top of said shaft, all of which said development work was to be done by the said H. K. Moore at his own cost and expense, and during the year 1896, and prior to the first day of January, 1897, in consideration of all of which the said defendant, John Clark, promised and agreed to and with the said H. K. Moore that if he, the said H. K. Moore, would do and perform such development work during the year 1896, and prior to the first day of January, 1897, he, the said John Clark, would set over, transfer, and convey, by a good and sufficient deed of conveyance, unto the said H. K. Moore, his one-half interest in and to the said Bear Track quartz claim, when and as soon as he the said H. K. Moore had fully completed and performed the said development work as aforesaid; and that in consideration of the performance of the said development work as aforesaid by the said H. K. Moore, he, the said H. K. Moore, should become the owner of, and should have, the said undivided one-half interest in and to said Bear Track quartz claim, so situated as aforesaid; and that the said Bear Track quartz claim, herein in this paragraph mentioned and referred to,

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is the same and identical mining claim mentioned and referred to in paragraph 2 hereof as the Bear Track claim." The complaint then alleges that the said Moore performed his part of the contract, on or about the first day of November, 1896, by sinking said shaft ten feet deeper, and by drifting twenty feet from a point in said shaft more than thirty feet below the surface; that thereafter, and on June 18, 1897, the said Moore assigned said contract to the plaintiff, due notice of which assignment was given to the defendant by said plaintiff and by said Moore; and that plaintiff then demanded of the defendant a deed to said undivided one-half interest in and to the said claim. The complaint alleged that said Moore was let into possession of said mining claim by the defendant on or about the 8th day of July, 1896. The defendant answered, denying specifically the allegations of the complaint, but alleged that a short time prior to November 22, 1895, at Florence, Idaho, the defendant made a contract with said Moore, by the terms of which the defendant agreed to deed to said Moore an undivided one-half interest upon condition that said Moore should sink the shaft on said claim ten feet deeper, and drift twenty feet from a point in said shaft thirty feet or more below the surface, and should pay the defendant the sum of \$756.50, said work to be done and said payment to be made on or before May 1, 1896; that it was agreed by the defendant and said Moore that they would meet later at Lewiston, Idaho, and reduce said agreement to writing; that afterward, and on November 22, 1895, said parties met at Lewiston, Idaho; and that said Moore there and then prepared a writing, which the parties signed, and which is in words and figures as follows, to wit:

"Lewiston, Idaho, Nov. 22, 1895.

"This agreement, made and entered into this twenty-second day of November, 1895, by and between John Clark, of Florence, Idaho, and H. K. Moore, of Moscow, Idaho, parties of the first and second part, respectively, witnesseth: For and in consideration of the following development work on the Bear Track quartz claim, at Florence—i. e., sinking ten feet of shaft at bottom of present shaft, and twenty feet of tunnel from a point in shaft (30) thirty or more feet below surface, said H. K. Moore, party of the first part, is to have one-half interest in and

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to said Bear Track quartz claims. That, if the foregoing conditions are fulfilled, it is further agreed by said John Clark that he will sell to said second party an undivided one-fourth interest to and in the Bear Track ditch and water right, for the specified sum of (\$600.00) six hundred dollars. That, if it seems advisable, said H. K. Moore is to relocate said claim, said John Clark at all times having an undivided one-half interest in said claims. That, if Chris Arnold claims a one-half interest to and in the Bear Track claim, he is to pay the sum of seven hundred fifty-six and 50-100 dollars, which is a lien against his interest and all other expenses which may be incurred in working the mine.

(Signed) "JOHN CLARK.

(Signed) "H. K. MOORE."

The answer alleges that, at the time of signing said agreement, the defendant objected to it, on the ground that it did not contain all of the terms agreed upon; among other things, that it did not provide for the payment to defendant of the said sum of \$756.50, and that defendant misunderstood several of the provisions in said written contract, and thought that other provisions agreed upon were in said written agreement when he signed it, but which were omitted. To prove its case, the plaintiff called said H. K. Moore as a witness, who testified that the contract was made at Lewiston, and partly reduced to writing, other material parts—that portion relating to the time of performance—being left out of the contract.

Without considering or passing upon the question arising under the statute of frauds, raised by the appellant, and numerous other questions presented in the record, we think that the plaintiff is precluded from the relief sought, on the ground that there is no mutuality in the contract, and it is not based on an adequate consideration. The defendant was the owner of an undivided one-half interest in and to the property in dispute. There is no valuable consideration moving from the plaintiff or its assignor to the defendant, according to the showing of the plaintiff. Under the allegations of the complaint and the evidence introduced upon the trial, said Moore was to do certain work upon the property in dispute, whereupon the defendant,

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without money, and without price, was to convey his interest in the property to said Moore. In order to be entitled to specific performance by judicial decree, the plaintiff should show several things; among others, that the contract is fair, certain, complete, reasonable, mutual, and based upon an adequate consideration. These requisites are not shown to exist in the case of the contract in question. There is no proof in the record showing the extent of the value of the property in dispute; hence the court could not determine what would be an adequate consideration for a deed for an undivided one-half interest from the defendant to the plaintiff. But the evidence shows that there was no consideration, adequate or otherwise, for the contract in question; so that the contract is neither fair, reasonable, mutual, nor based on an adequate consideration, and the plaintiff cannot obtain the relief sought. At the close of the plaintiff's evidence, the trial court should have rendered a judgment dismissing the action, with costs to the defendant. The judgment of the district court is reversed, and the cause remanded for further proceedings consistent with the views herein expressed. And it appearing from the record in this cause that the plaintiff (respondent here) is in possession of the premises described in plaintiff's amended complaint, and that the defendant (appellant here) is kept out of such possession by the orders of the district court, it is therefore ordered and adjudged that the said plaintiff restore to the said defendant the possession of said premises; and, should the plaintiff fail so to do after demand by the defendant, then, on application of the defendant, this court will make such further orders as may be necessary and proper in the premises. Costs of this appeal awarded to the appellant.

Sullivan, C. J., and Huston, J., concur.

Argument for Respondent.

(November 15, 1898.)

GAMBLE v. CANADIAN AND AMERICAN MORTGAGE
AND TRUST COMPANY.

[55 Pac. 241.]

SATISFACTION OF MORTGAGE—COMPLAINT—ALLEGATION OF PAYMENT—

DEMURRER.—In an action under the provisions of section 3364 of the Revised Statutes to compel the discharge of a mortgage and to recover damages and penalty, the complaint must contain a direct and unequivocal allegation of payment of the amount secured by such mortgage.

(Syllabus by the court.)

APPEAL from District Court, Latah County.

George W. Goode and L. N. B. Anderson, for Appellant.

Admitting that the complaint failed to set forth the fact "that the notes and mortgage had been fully paid and satisfied," even then the complaint would be sufficient with the allegation of tender, for whenever a mortgagor tenders to the mortgagee the full amount due under the mortgage, and the mortgagee refuses to accept the same, the lien of the mortgage is thereby discharged and the mortgagor has his statutory remedy for penalty. (*Van Husan v. Kanouse*, 13 Mich. 302; *Caruthers v. Humphry*, 12 Mich. 270; 15 Am. & Eng. Ency. of Law, 873; *Daniels v. Densmore*, 32 Neb. 40, 48 N. W. 906; *Bernard v. Harrison*, 30 Mich. 8; *Campbell v. Seely*, 38 Mo. App. 298.) As to the essentials of a complaint of this nature, see *Sweet v. Ward*, 43 Kan. 695, 23 Pac. 941; *Steiner v. Ellis* (Ala.), 7 South. 803. As to whether or not the mortgage has been satisfied, or satisfaction tendered, is a matter of evidence and a question of fact for a jury. (*Wilbur v. Peirce*, 56 Mich. 169, 22 N. W. 316; *Stevens v. Home Sav. Assn.*, 5 Idaho, 739, 51 Pac. 779.)

Orland & Smith, for Respondent.

The appellant seems to rely upon his tender to make the allegations of his complaint sufficient to give him any standing in court. As the tender is not alleged to have been in writing,

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under section 6110 of the Revised Statutes, the fact of refusal would not excuse the plaintiff from the actual production of the money. The plea of tender is not sufficient; the plaintiff should keep his tender good, by showing his readiness at all times to pay and by bringing his money into court. (3 *Estee's Pleadings* by Boone (cases cited), sec. 5361; *Weldon v. Seelye*, 8 Barb. 408; *Bryan v. Maume*, 28 Cal. 239; *Roosevelt v. Bank*, 45 Barb. 579; *Cronin v. Epstein*, 1 N. Y. Supp. 69; *Commercial F. Ins. Co. v. Allen*, 80 Ala. 571, 1 South. 202; *Wolff v. Canadian P. Ry.*, 89 Cal. 333, 26 Pac. 825; *Bissell v. Haywood*, 96 U. S. 580; *Henderson v. Cass Co.*, 107 Mo. 50, 18 S. W. 992; *Burlock v. Cross*, 16 Colo. 162, 26 Pac. 142; *Becker v. Boone*, 61 N. Y. 317.)

SULLIVAN, C. J.—This action was brought to compel the satisfaction of a certain mortgage for damages and penalty provided for by the provisions of section 3364 of the Revised Statutes. It is alleged in the complaint that said mortgage was executed by one Chris G. Longeteig and wife in favor of the defendants Macmaster, and was thereafter assigned to the defendant the Canadian and American Mortgage and Trust Company; that on or about the tenth day of December, 1891, the said mortgagors sold and conveyed to the plaintiff, who is the appellant here, the mortgaged premises. It is also alleged that the appellant has fully "paid and satisfied said notes and mortgage in so far as the holder of said notes and mortgage is concerned." It is further alleged that, notwithstanding said mortgage and notes had been fully paid and satisfied, appellant did, on the fifteenth day of March, 1898, tender to said defendants above named, in lawful money of the United States, the sum of \$500, and thereupon "demanded that the holder of said mortgage acknowledge and satisfy the said mortgage of record." The defendants entered a general demurrer to said complaint, which was sustained by the court, and judgment of dismissal entered, from which judgment this appeal was taken. The order sustaining the demurrer and the judgment of dismissal are assigned as error.

The complaint does not state a cause of action. There was no error in sustaining the demurrer and entering the judgment

Argument for Appellants.

of dismissal. The allegations of the complaint, to wit, "that the said plaintiff has fully paid and satisfied the notes and mortgage in so far as the holder of said notes and mortgage is concerned," is not a sufficient allegation of the payment in full of the sum secured by the mortgage, as required in an action brought under the provisions of section 3364 of the Revised Statutes. As the record contains no error, the judgment of the court below must be sustained, and it is so ordered. Costs of the appeal are awarded to the respondents.

Huston and Quarles, JJ., concur.

(November 16, 1898.)

FIRST NATIONAL BANK OF MOSCOW v. MARTIN.

[55 Pac. 302.]

STIPULATION.—A stipulation of parties in disregard of the rules of the court will not be regarded by the court.

BANKRUPTCY—BOND OF ASSIGNEE—BREACH OF BOND.—In an action upon the bond of an assignee in bankruptcy, where the trial court finds that assets to the amount of \$2,005 of the bankrupt's estate have been received by the assignee, that all of the proceedings required by statute have been followed up to enforce an accounting by the assignee, but that such assignee has failed and neglected to account for such assets, a finding by the court that such failure on the part of the assignee constitutes a breach of the bond is not error.

SHAM AND FRIVOLOUS ANSWERS.—An answer which contains denials upon information and belief of matters which are entirely made up of the files and records in a case in which the defendant was a principal party is properly stricken out as sham and frivolous. (Syllabus by the court.)

APPEAL from District Court, Latah County.

G. G. Pickett and S. S. Denning, for Appellants.

Where it is that an action is pending or has been tried in the same court as the case on trial, and either of the parties rely on the records of the other case, the court will not nor cannot take

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judicial notice of such record unless the same is offered in evidence. (*Downing v. Howlett*, 6 Colo. App. 291, 40 Pac. 505; *Myers v. State*, 46 Ohio St. 473, 15 Am. St. Rep. 638, 22 N. E. 43; *People v. De La Guerra*, 24 Cal. 73, 77; *Water Co. v. Coles*, 31 Cal. 215; *Ralphs v. Hensler*, 97 Cal. 296, 32 Pac. 243; *Daniel v. Bellamy*, 91 N. C. 78; *Ferrier v. Bates*, 55 Tex. 193; Idaho Rev. Stats., sec. 4208.) Sham and irrelevant answers and irrelevant and redundant matter inserted in the pleading may be stricken out upon such terms as the court in its terms impose. (*Fay v. Patterson*, 51 Cal. 313; *Greenbaum v. Turrill*, 57 Cal. 285; *Lybecker v. Murray*, 58 Cal. 186.)

Forney, Smith & Moore, for Respondent.

It is fundamental that sham and irrelevant answers and matters inserted in a pleading may be stricken out. (Idaho Rev. Stats., sec. 4208; Pomeroy's Code Remedies, secs. 551, 552, 585; Bliss on Code Pleadings, 422.) Upon the right to strike out matters denying court records upon information and belief, we cite *Mullally v. Townsend*, 119 Cal. 47, 50 Pac. 1066, which case holds that the court can absolutely disregard such denials. (*Mulcahy v. Buckley*, 35 Pac. 144, 100 Cal. 484; *Cumins v. Lawrence Co.*, 1 S. Dak. 158, 46 N. W. 182.) The allegations at paragraph 4 of the complaint being expressly admitted at paragraph 4 of the answer, none of the defendants could question the validity of the claim sued upon. The claim having been allowed by the assignee, such allowance binds the bondsmen. An assignee, in the allowance of a claim, acts judicially. (*Krider v. Coley*, 7 Kan. App. 349, 51 Pac. 919.)

HUSTON, J.—This is an action upon the bond of an assignee in bankruptcy. The record presented in this court contains the pleadings in the case (consisting of the complaint, demurrer to complaint, the answer, demurrer to answer, notice of motion, and motion to strike out portions of the answer, and the rulings of the court thereon), the findings of fact and conclusions of law by the court, the decree, a bill of exceptions, notice of appeal, and what is designated in the record as an "Enumeration of Original Papers."

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The bill of exceptions contains simply the motion of plaintiff to strike out a portion of the answer, the ruling of the court sustaining the same, and the defendants' exception thereto. Appellants have also presented the court with a bundle of papers, purporting to be the files and copies of the record in the bankruptcy proceedings in which the principal defendant L. D. Martin was appointed assignee, and the bond sued on was given. It seems by the record that the attorneys in the case stipulated that these papers "may be omitted from the printed transcript on appeal, and the parties hereto agree that the said records and files, as the same are now in the above court, may be used upon the hearing of said appeal." In making stipulations, counsel should not be unmindful of the rules prescribed by the court. Our rules require transcripts to be printed. We cannot consent to go into an examination of the files and records of a bankruptcy proceeding which was pending in the district court for several years, when the same, or such portions thereof as are essential to a proper presentation of the case, are not incorporated in the printed transcript. We think, however, that we can properly dispose of this case from a consideration of the printed transcript. The court finds that the said L. D. Martin has failed and neglected to account for the assets of said estate which came into his hands as such assignee; that there came into the hands of said assignee, as appears by the invoice of the assets of said bankrupt estate, property of the appraised value of \$2,005; that the whole amount accounted for by said L. D. Martin as assignee was \$857.37; that the total amount of claims presented against said estate was the sum of \$624.32, or thereabouts; that no dividends were ever paid by said assignee to any of the creditors. These findings are based upon the evidence presented to the court, and, in the absence of any showing to the contrary, will be deemed correct. It is admitted by defendants that there came to the hands of said assignee, as such, assets of said bankrupt's estate to the amount of \$2,005. It is further admitted by the defendants that no dividend has ever been paid to the creditors of said estate. These facts, found by the court and admitted by the defendants, would seem to be sufficient to establish the liability of the defendants.

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Counsel for appellants make five assignments of error. The first is that the complaint does not state facts sufficient to constitute a cause of action. The complaint contains a concise statement of the proceedings in bankruptcy leading up to and constituting the alleged breach of the conditions of the bond. This error is not well laid.

The second error assigned is in sustaining the demurrer to defendants' answer, and the third assignment is in striking out a portion of the answer. There was no error either in sustaining the demurrer, or in allowing the motion to strike out. The answer admitted enough to entitle the plaintiff to judgment. The denials were mostly upon information and belief. To designate an answer as sham and frivolous which is made up of denials, upon information and belief, of matters entirely of record in a proceeding in which the defendant was a principal party, is emulative of the roaring of Nick Bottom. The defendant must of necessity have been conversant with all the proceedings in bankruptcy, and for him to deny under oath any knowledge of them is not calculated to inspire the court with that unfaltering trust which it is always desirable courts should have in the statements in pleadings prepared by counsel.

There is nothing in the fourth and fifth assignments of error. The fourth is to the entering of judgment against defendants, and the fifth is to the receiving in evidence of the papers (files and record) in the bankruptcy proceedings. We find no error in the action of the court in either instance. The points made in the defendants' brief do not seem to have any particular relation to the assignments of error, but we think it unnecessary to discuss them in detail. As to the action of the district court in the bankruptcy proceedings, it is sufficient to say that such action is not here for review, nor could it be reviewable in this case. Judgment of the district court is affirmed, with costs to respondent.

Sullivan, C. J., and Quarles, J., concur.

Opinion of the Court—Sullivan, C. J., on Rehearing.

ON REHEARING.

(December 7, 1898.)

SULLIVAN, C. J.—A petition for rehearing has been filed in this case by counsel for appellant, based on two grounds: 1. That the court misapprehended the facts; and 2. That the court is mistaken in the law as applied to the actual facts. The court understands the facts as set forth in the transcript, and has correctly applied the law applicable to those facts. The inventory value of the property placed in the hands of the assignee was \$2,005. He failed to file any account of his management of said insolvent estate until the court compelled him to, on the application of some of the creditors. He then filed what he terms his "final account." Objection was made thereto by some of the creditors, and sustained by the court. Thereafter he filed an amended final account. That was objected to, and objection sustained by the court. And thereafter he filed a second amended final account, which was objected to, and objection sustained by the court. And thereafter he filed his supplemental final account, which was objected to, and objection sustained by the court. We have examined said accounts, and think the court committed no error in refusing to settle them. Section 5901 of the Revised Statutes provides that upon the assignee filing his final account, the court must settle the same. Neither of the accounts filed was such as is contemplated by said section. The assignee is required to account strictly for the trust properties. It is shown that the merchandise, liquors, bar fixtures, etc., were valued in the inventory at \$2,005; that \$983.55 thereof was accounted for, "item by item"; and it is shown that the assignee received therefor \$493. Deducting the invoice price of the items so accounted for from the total invoice or appraised value would leave in his hands goods appraised at \$1,011.45, from which he claims to have realized \$364.38, or sufficient to make his total cash receipts \$857.38. He has failed and refused to account for the said balance of said stock so appraised at \$1,011.45, as required by law. He simply reports that he has realized therefrom \$364.38, and that he is unable to account,

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giving the items—where sold, to whom sold, and the price received for each; \$364.38 deducted from the \$1,011.45 would leave in his hands, unaccounted for, \$637.07 of said assets, which is amply sufficient to pay the judgment in this case, without taking into consideration the balance of the \$857.38 cash received by the assignee after deducting the claims that the court has ordered paid therefrom. It is shown that an estate valued at \$2,005 came into the hands of the assignee, with claims against it amounting to but \$624.35, and the entire assets were absorbed in the payment of costs and assignee's and attorney's fees, except \$18.67, which the assignee attempts to turn in to court, and asks to have sufficient thereof applied in payment of the amount due the officers of Latah county. An assignee cannot dispose of the assets or cash which he receives as he may think best. His only safety is in making no sales except such as are authorized by the court, and in paying no claims except as directed by the court. While it is true he reports that he had sold said \$1,011.45 worth of property, it is also true that, after demand therefor by the creditors, he has neglected to file an itemized report of the sale of said property—when sold, and to whom sold, and the price received for such items. The creditors have a right to know what becomes of each piece of property placed in the assignee's hands, and it is his duty to keep an accurate account of his dealings with the trust property. (*Hooper v. Winston*, 24 Ill. 354.) In case he fails to do so, every presumption is against him. If the assignee was not satisfied with the action of the court in refusing to settle his final account, or what he presented as his final account, he had his remedy. However much this court may deplore the hardship that may come to the sureties of the assignee because of his management of this estate, we are fully satisfied with the opinion in this case, and the petition for a rehearing is denied.

Huston and Quarles, JJ., concur.

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Argument for Appellant.

(November 17, 1898.)

BURBANK v. KIRBY.

[55 Pac. 295.]

HOMESTEAD—STATUTE MUST BE STRICTLY COMPLIED WITH TO CREATE.—To entitle one to the benefit of a homestead the provisions of the statute as to filing and declaration of homestead must be strictly complied with.

SAME—DECLARATION—ACKNOWLEDGMENT.—When K., a married woman, filed a declaration of homestead upon community property, which declaration was not acknowledged and certified as required by statute, such filing did not constitute the property filed on a homestead, and it is too late after judgment sale and sheriff's deed thereunder to ask for the reformation of such acknowledgment in an action by the grantor in the sheriff's deed to recover possession of the property.

(Syllabus by the court.)

APPEAL from District Court, Latah County.

Forney, Smith & Moore, for Appellant.

The court made and signed findings of fact, conclusions of law and decree, finding for the defendant and permitting the said instrument to stand against a creditor and supplying the defect in the certificate of acknowledgment by extraneous evidence. The declaration was absolutely void. (*Beck v. Soward*, 76 Cal. 527, 18 Pac. 650; *Kennedy v. Gloster*, 98 Cal. 143, 32 Pac. 941; *Co-operative Loan etc. Assn. v. Green*, 5 Idaho, 660, 51 Pac. 770; *Goodwin v. Mortgage Co.*, 110 U. S. 1, 3 Sup. Ct. Rep. 473; *Smith v. Richards*, 2 Idaho, 498, 21 Pac. 419.) No rights were acquired under the said instrument purporting to be a homestead declaration. (*Kennedy v. Gloster*, 98 Cal. 143, 32 Pac. 941; *Beck v. Soward*, 76 Cal. 527, 18 Pac. 650; *Waples on Homesteads*, 169-176 and cases, note 4) The defense is insufficient. (*Kennedy v. Gloster*, *supra*; *Beck v. Soward*, *supra*; *Pomeroy's Code Remedies*, secs. 87, 88, 92, 94, 97, 99; *Goodwin v. Mortgage Co.*, 110 U. S. 1, 3 Sup. Ct. Rep. 473—Justice Harlan.) The method provided by the statute of Idaho, sections 3035-3038, inclusive, is the only method or mode by which a

Argument for Respondents.

homestead can be acquired in Idaho. (*Rosenthal v. Merced Bank*, 110 Cal. 203, 42 Pac. 640; *Law v. Spence*, 5 Idaho, 244, 48 Pac. 282 (284); *Wright v. Westheimer*, 3 Idaho, 232, 35 Am. St. Rep. 269, 28 Pac. 430; *Wilcox v. Deere*, 5 Idaho, 545, 51 Pac. 98; *Gaylord v. Place*, 98 Cal. 478, 479, 33 Pac. 484; *Smith v. Richards*, 2 Idaho, 498, 21 Pac. 419.) Conceding that the defendants acquired an equitable interest by virtue of the pretended homestead, such right has been absolutely waived. It was not set up in the original case of *H. C. Burbank & Co. v. Thomas Kirby*. The lands and premises herein were attached in that case. The defendant should have defended therein. (Waples on Homesteads, 882, 883; *Stockton v. Ford*, 18 How. 418; *Harshman v. Knox County*, 122 U. S. 306, 7 Sup. Ct. Rep. 1171.) A defective homestead cannot be aided by extraneous evidence. (*Wilcox v. Deere*, *supra*; *Kennedy v. Gloster*, *supra*; *Goodwin v. Mortgage Co.*, *supra*; Waples on Homesteads, 177.) There being no valid declaration on file at the time of the levy of the attachment in *H. C. Burbank & Co. v. Thomas Kirby*, the premises, although community property, were subject to levy in said case. (Idaho Rev. Stats., 3039; *Wright v. Westheimer*, 3 Idaho, 232, 35 Am. St. Rep. 269, 28 Pac. 430; *Law v. Spence*, 5 Idaho, 244, 48 Pac. 282 (284).)

James E. Babb and George W. Coutts, for Respondents.

A declaration of homestead is an "instrument" within section 2971 of the Revised Statutes. The certificate of acknowledgment is reformable if the acknowledgment was properly taken. The right to reform is good against all persons chargeable with notice. (*Grotenkemper v. Carver*, 77 Tenn. 230; *Coal Creek Min. Co. v. Heck*, 83 Tenn. 497.) Possession charges persons with notice of right of reformation. (*Morrison v. Wilson*, 13 Cal. 495, 73 Am. Dec. 593; *Stahn v. Hall*, 10 Utah, 400, 37 Pac. 585; *Phoenix Mut. Life Ins. Co. v. Beaman*, 5 Kan. App. 772, 48 Pac. 1007.) Where parties actually know an instrument to be of record, though defectively certified, they are charged with notice that it may have been correctly acknowledged, though it be defectively certified. (*Brusie v. Gates*, 80 Cal. 462, 22 Pac. 284, 286; *Whittier v. Varney*, 10 N. H. 300;

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Wedel v. Herman, 59 Cal. 507; *Platt's Property Rights of Married Women*, 55, 56.) A declaration of homestead on community property is not then within the intent of purpose of the statute requiring separate examination and acknowledgment. (*Clements v. Stanton*, 47 Cal. 61; *Furrow v. Athey*, 21 Neb. 671, 59 Am. Rep. 867, 33 N. W. 208.)

HUSTON, J.—Plaintiff having recovered a judgment in the district court against defendant Thomas Kirby, issued execution thereon, and levied upon, and sold thereunder, certain real estate of said defendant. Having received a sheriff's deed of the real estate, plaintiff made demand of possession of the property of defendant, and, possession being refused by the defendant, plaintiff brought this action to recover possession. Judgment in the first action was taken by default after personal service, no appearance having been made in said action by defendant. To this action defendants appear, and set up as a defense that prior to the levy of the attachment and recovery of judgment by plaintiff against the defendant Thomas Kirby, the defendant, **May Kirby**, as the wife of the said Thomas Kirby, had filed a declaration of homestead upon the real estate in question, and that by reason thereof said real estate was not subject to levy and sale. The real estate in question was community property. It is claimed by plaintiff that the declaration of homestead filed by said defendant **May Kirby**, as wife of defendant, **Thomas Kirby**, not having been acknowledged, as required by the statute of Idaho, the same was void and inoperative, and did not constitute a homestead under the statutes of this state. Section 3070 of the Revised Statutes of Idaho is as follows: "In order to select a homestead, the husband or other head of the family, or in case the husband has not made such selection, the wife must execute and acknowledge in the same manner as a conveyance of real property is acknowledged, a declaration of homestead and file the same for record." Section 3073 provides that: "From and after the time the declaration is filed for record, the premises therein described, constitute a homestead." It is palpable that the declaration of homestead relied upon by the defendants in this case was not, as shown by the certificate of the

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notary, acknowledged, as required by statute. Section 2971 of the Revised Statutes of Idaho is as follows: "When the acknowledgment or proof of the execution of an instrument is properly made, but defectively certified, any party interested may have an action in the district court to obtain a judgment correcting the certificate." The statutes we have quoted were copied from those of California, and before their adoption by Idaho had been repeatedly passed upon and construed by the supreme court of the former state. In *Kennedy v. Gloster*, 98 Cal. 143, 32 Pac. 941, following *Beck v. Soward*, 76 Cal. 527, 18 Pac. 650, the court says: "The certificate must be attached to the declaration, and the paper may then be filed for record, and constitute a homestead; but, if the certificate is not made in substantial conformity to the requirements of the statutes, the paper is not entitled to record, and if filed and recorded, it will not constitute a homestead." Accepting the construction of the statute as given by the supreme court of California, we must conclude that at the time the attachment by plaintiff was levied, at the time he recovered judgment, at the time of the sale under execution, and the making and delivering of a deed by the sheriff, no homestead existed on the lands in question.

But it is claimed by counsel for defendants that, as the acknowledgment was properly taken, and that the defect in the certificate arose from an oversight on the part of the notary, the defendants are entitled to have said certificate reformed in this action, and that such reformation shall relate back to the time of the filing for record of the declaration of homestead. We cannot agree with this contention. We have examined all of the authorities accessible cited by counsel in support of his position, and find that without exception they apply to cases of conveyances. A homestead is not a conveyance. It possesses none of the essential requisites of a conveyance. There is neither grantor, nor grantee, nor consideration in a declaration of homestead. There is no transfer of, or change in, the title. It is the act of the owner of the property, whereby such owner secures a right or privilege given him by the statute, and which is in derogation of the common law and common right, and which can only be secured by a substantial compliance with the provisions of the

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statute, conditions precedent to the investiture of the property with the exceptional character contemplated. If the title to the property passes from the owner by due and proper proceedings in the course of law, he cannot, after such title has vested in another, defeat it by establishing a homestead *nunc pro tunc*. The declaration of homestead was prepared, executed, and acknowledged on the 10th of August, 1893. On the third day of November, 1893, it was filed for record. On February 15, 1894, plaintiff commenced his action, and issued attachment, and levied the same upon the property in question; and on March 31, 1894, judgment was entered against the defendant Thomas Kirby and in favor of plaintiff. On August 26, 1894, execution was issued on the judgment, and on November 12th sale was had, and certificate of sale and sheriff's deed were thereafter executed and delivered to plaintiff. Defendants had six months and over after the execution of the declaration of homestead in which to have the defective certificate of acknowledgment corrected as provided in section 2971 of the Revised Statutes, or to file a new and proper declaration, and did not avail themselves of either remedy. Judgment of district court is reversed, with costs to appellant.

Sullivan, C. J., and Quarles, J., concur.

ON REHEARING.

(December 15, 1898.)

QUARLES, J.—The respondents have filed a petition for rehearing, which we have carefully considered. The certificate of acknowledgment to the declaration of homestead in question here cannot be reformed so as to affect the attachment lien of the appellant. We think that such certificate to a declaration of homestead may be amended, but not as against a creditor who has, by attachment judgment or other means, acquired a lien on the premises claimed as a homestead. Under section 3070 of the Revised Statutes, the declaration of homestead must be acknowledged in the same manner as a conveyance of real estate. Section 3072 provides that the declaration must be recorded in the county recorder's office, and by section 3073 the

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declaration takes effect from the time it is filed for record. Unless the declaration is acknowledged as required by law, the recorder is not required to file or record it. If it is not acknowledged and certified in the manner required by law, the filing and recording of it in the county recorder's office imports no notice to creditors, and does not bind them. The proceeding to exempt the homestead is a statutory one. To exempt the home from the lien of attachment, judgment, or execution, a declaration, containing the matters required by law, acknowledged as required by law, and the acknowledgment certified as required by law, must be filed in the county recorder's office in the county where the homestead is situated.

Query: If a declaration is properly executed, properly acknowledged, but the acknowledgment defectively certified, can the declarant maintain an action to amend or reform the certificate, there being no liens on the homestead? We are asked to decide this question, but it is unnecessary to do so in this case. We will content ourselves with the suggestion that courts do not entertain idle suits, and the declarant could, in the case suggested, get all of the relief that he is entitled to by merely executing a new declaration, and filing it for record, with a proper certificate of acknowledgment thereto, or by acknowledging and procuring a proper certificate of acknowledgment to the old declaration. Courts are averse to helping those who can help themselves, but will not do so. A rehearing is denied.

Sullivan, C. J., and Huston, J., concur.

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(November 19, 1898.)

APPLINGTON v. G. V. B. MINING COMPANY.

[55 Pac. 241.]

DEFAULT JUDGMENT—SERVICE OF SUMMONS—JUDGMENT-ROLL—On appeal from a default judgment against a foreign corporation who has not appeared in the action, the judgment-roll must contain evidence of the service of the summons upon that person designated by such corporation upon whom process is to be served under the provisions of section 2853, Revised Statutes, or else upon one of the agents or officers of such corporation mentioned in subdivision 2 of section 4144, Revised Statutes, and if such evidence of service of summons does not appear in the judgment-roll, the judgment will be reversed on appeal.

(Syllabus by the court.)

• APPEAL from District Court, Blaine County.

Texas Angel, for Appellant.

No brief filed.

A. F. Montandon, for Respondent.

Before the filing and service of the notice of appeal in this cause, which was filed and served December 14, 1897, defendant filed and served its general appearance. By a general appearance defendant gave the court immediate jurisdiction over its person (Code, sec. 4892), and thereby cured any defect in the service of summons upon it. If before the general appearance the judgment complained of was invalid because of insufficient service or an insufficient return, by the general appearance it was made valid, and thereby became and thenceforth was a perfect and valid judgment. (*Steinbach v. Leese*, 27 Cal. 299; *Glidden v. Packard*, 28 Cal. 649; *Moore v. Koubly*, 1 Idaho, 55; *Curtis v. Walling*, 2 Idaho, 416, 18 Pac. 54.)

QUARLES, J.—This action was commenced by the respondent, as plaintiff, against the appellant, as defendant, to recover upon eight several promissory notes executed by the appellant to divers parties, and by the several payees assigned to the respondent. Each of said notes was executed prior to Jan-

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uary 1, 1897, and drew interest from date at the rate of eighteen per cent per annum, and the complaint alleges that interest was paid on each of said notes to January 1, 1897. The complaint alleges that the defendant is a corporation organized and doing business under the laws of the state of New York, and operating mines in Blaine county, Idaho. The complaint was filed January 12, 1897, and summons issued that day, and was placed in the hands of the sheriff of Blaine county, who returned that he served the same, with a copy of the complaint in the action, "by delivery to and leaving with Mrs. Nancy Thurber, the president of said G. V. B. Mining Company, a corporation, in the county of Blaine, on the thirteenth day of January, a copy of said summons," etc. The prayer for judgment in the complaint is as follows: "Wherefore plaintiff demands judgment against defendant for the sum of thirteen thousand two hundred forty-one dollar and fifty-six cents, with interest thereon from the first day of January, 1897, at the rate of one and one-half per cent per month, for two hundred fifty dollars attorney fee, and costs." The notice in the summons, and required by subsection 4, section 4140 of the Revised Statutes, is as follows, to wit: "And you are hereby notified that if you fail to appear and answer the said complaint, as above required, the said plaintiff will take judgment by default for the sum of \$13,241.65, with interest thereon from the first day of January, 1897, at the rate of one and one-half per cent per month." The defendant having failed to appear, its default was entered by the clerk, and thereupon judgment was entered against the defendant by the clerk on the twenty-eighth day of January, 1897, for \$13,670.30, and costs, taxed at \$12.55. From this judgment the defendant corporation appeals, and this cause is before us upon the judgment-roll, which, under the provisions of section 4456 of the Revised Statutes consists in this case of "the summons with the affidavit or proof of service, and the complaint, with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment." This appeal is to be decided upon the judgment-roll solely.

No question as to the sufficiency of the complaint arises. The appellant contends that the certificate of service of summons

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made by the sheriff, the material part of which is hereinbefore quoted, shows that the summons was not served upon any agent or person upon whom such service could be legally made, for which reason the defendant had not been summoned, and the judgment was without jurisdiction, and void. We think this contention is correct. Section 2653 of the Revised Statutes provides, *inter alia*, that a foreign corporation doing business in this state must, by writing filed with the clerk of the district court in the county in which its principal place of business is, and also with the Secretary of State, "designate some person residing in the county where the principal place of business of such corporation in this state is conducted, upon whom process," etc., "may be served; and that service upon such person shall be valid service upon such corporation." It is provided in section 4144 of the Revised Statutes that: "The summons must be served by delivering a copy thereof, as follows: 1. If the suit is against a corporation formed under the laws of this state to the president or other head of the corporation, secretary, cashier, or managing agent thereof; 2. If the suit is against a foreign corporation . . . doing business and having a managing or business agent, cashier or secretary within this state to such agent, cashier or secretary." Now, the proof of service in the record before us is silent as to whether a designation in writing of a person residing in Blaine county upon whom process might be served for and on behalf of the foreign corporation defendant was on file in the office of the district clerk of said county, or in the office of the Secretary of State or not, while said proof of service shows that such service was made upon Mrs. Thurber, the president of the defendant corporation, and does not show that she was the "managing" or "business" agent or "cashier" or "secretary" of the defendant corporation. We cannot presume that Mrs. Thurber was a managing or business agent, or that she was a secretary or cashier of the company. A service of summons on a foreign corporation, to be good, must be made in the manner prescribed by the statutes. Under the provisions of sections 2653 and 4144 of the Revised Statutes, the service of summons shown by the certificate of the sheriff in the record before us cannot be held good.

Argument for Appellant.

For want of proof of a valid service of the summons, the clerk had no jurisdiction to enter the judgment. (See the case of *Trust Co. v. McGregor*, decided by this court, and reported in 5 Idaho, 510, 51 Pac., at page 104, and authorities there cited.) Then the clerk entered judgment for over \$200 more than the amount specified in the notice in the summons above quoted. This was error, but as to the effect of this error in the absence of other error it is not necessary for us to decide. Judgment reversed, with costs to appellant.

Sullivan, C. J., and Huston, J., concur.

(November 19, 1898.)

CORNWELL v. MCCOY.

[55 Pac. 240.]

AGENCY — LOANING MONEY — INTEREST — COMMISSION — USURY.—M. applied to plaintiff by a written application, wherein he appointed plaintiff his agent for the purpose, to procure for him a loan of \$800 for a period of five years, with interest at the rate of eight per cent per annum, payable annually. For his services in procuring said loan plaintiff charged M. a commission of ten per cent upon the sum so procured and loaned, M. and his wife giving to plaintiff their notes and mortgage to secure said sum. *Held*, that such charge for commission, in the absence of any proof showing that plaintiff was acting as the agent of party from whom said loan was procured, or that such party was interested in or received any part of the commission so charged, the same did not come within the provision of title 7, chapter 10, Revised Statutes of Idaho, and was not usurious.
(Syllabus by the court.)

APPEAL from District Court, Nez Perces County.

James E. Babb, for Appellant.

The special defense did not allege facts sufficient to constitute a defense. (*Mackey v. Winkler*, 35 Minn. 513, 29 N. W. 337; *Acheson v. Chase*, 28 Minn. 211, 9 N. W. 734; *Nichols v. Osborn*, 41 N. J. Eq. 92, 3 Atl. 155; *Thomas v. Miller*, 39

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Minn. 339, 40 N. W. 358; *Secor v. Patterson*, 114 Mich. 37, 72 N. W. 9; *Merck v. American etc. Mtg. Co.*, 79 Ga. 213, 7 S. E. 266-269.) Usury must be pleaded and must be established by evidence beyond a reasonable doubt. (*Jones on Mortgages*, 15th ed., sec. 643; *Jefferson v. Burhans*, 85 Fed. 949.)

S. C. Herren, for Respondents.

The defendants contend that the contract upon which this action is based is usurious and void. The evidence shows and the plaintiff practically admits these notes to be interest notes, but treats them as a commission. If interest notes, then they must be legal interest. The law knows no such term as commission interest. If Mr. Tallmon, the principal, could not charge compound interest, certainly his agent, Mr. Cornwell, could have no greater or more extensive privileges under the law. The two contracts referred to by plaintiff in his brief are but the ordinary forms used by brokers. (*Banks v. Flint*, 54 Ark. 40, 14 S. W. 769, 16 S. W. 477.) Under sections 1264, 1265 and 1266 of the Revised Statutes of the state of Idaho, we find the rule laid down governing and defining usury in this state, and in addition to the statute, this court has construed the rule to be that "usury cannot be charged either directly or indirectly." (*Vermont Loan etc. Co. v. Hoffman*, 5 Idaho, 376, 49 Pac. 314; *Warren v. Johnson*, 38 Kan. 768, 17 Pac. 592; *Matthews v. Toogood*, 23 Neb. 536, 37 N. W. 265; *Thompson v. Ingram*, 51 Ark. 546, 11 S. W. 881; *Horkan v. Nesbitt*, 58 Minn. 487, 60 N. W. 132; *Fowler v. Equitable Trust Co.*, 144 U. S. 334, 12 Sup. Ct. Rep. 1.)

HUSTON, J.—This is an action brought by plaintiff to foreclose a mortgage on real estate executed by defendants Alfred D. McCoy and Emma H. McCoy, his wife, to plaintiff, Henry Derham, William Kaufman, and E. Kaufman, partners as Derham & Kaufman, are made defendants as subsequent encumbrancers. Alfred D. McCoy and Emma H. McCoy, his wife, made default after personal service. Derham and Kaufman answer, and aver that the plaintiff, acting as the agent of one James H. Tallmon, on the twenty-seventh day of November, 1891, negotiated a loan to said defendants Alfred D. McCoy

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and Emma H. McCoy, his wife, of the sum of \$600, payable on the first day of December, 1896, at the Mechanics' Saving Bank at Hartford, Connecticut, evidenced by a promissory note to that effect, signed by said Alfred D. McCoy and Emma H. McCoy, to which principal note were attached five coupon notes of even date therewith, said coupon notes bearing the rate of interest of eight per cent per annum after due, and payable to James H. Tallmon; and the said Alfred D. McCoy and Emma H. McCoy, his wife, did at the same time, to wit, on the twenty-seventh day of November, 1891, execute to said James H. Tallmon, as security for the payment of said sum of \$600 and the interest thereon as aforesaid, a mortgage upon the real estate described in the complaint: The answer further alleges that the plaintiff, while acting as the agent of said James H. Tallmon, and without any consideration being paid therefor, did exact and require of the said Alfred D. McCoy and Emma H. McCoy, his wife, the payment of the sum of sixty dollars as commission on the said sum of \$600 loaned by the said James H. Tallmon to the said Alfred D. McCoy and Emma H. McCoy, his wife, all of which it is alleged was in violation of the statutes of Idaho against usury. The action was tried before the court without a jury, and the judgment rendered in favor of defendants, from which judgment, and from the order overruling his motion for a new trial, the plaintiff takes this appeal.

The facts, as shown by the record, are substantially as follows: The plaintiff was residing at Colfax, in the state of Washington, and was engaged in the procuring of loans upon real estate in the states of Washington and Idaho. The defendant Alfred D. McCoy, through Potter and Coutts, of Kendrick, Idaho, made application to plaintiff to procure for him a loan of \$600 for the term of five years, with interest at eight per cent per annum, payable December 1st annually; which application was in writing, signed by the said Alfred D. McCoy, and constituted and appointed the plaintiff his agent for the purpose of procuring said loan. The loan was procured, as would appear from the record, by the plaintiff of one James H. Tallmon, to whom the notes and mortgage securing the same were executed. We find nothing in the record to support the claim of defendants that

Points decided.

in making the said loan plaintiff was acting as the agent of Tallmon, or that he ever received any compensation whatever from said Tallmon for the making of said loan. The witness Coutts, who was acting for the defendant McCoy in procuring the loan, testified that his commission therefor was paid by plaintiff. We find no evidence in the record warranting or sustaining the finding of the court that "the note sued on and described in the complaint was an interest charge of ten per cent upon the principal sum of \$600, taken in the name of said Tallmon." That the plaintiff was the duly constituted and appointed agent of McCoy to procure the loan is clear and unquestioned. That plaintiff received any other compensation for his services than the commission charged McCoy, or that such charge was unreasonable, is not pretended. Nor is it anywhere intimated in the record that Tallmon, directly or indirectly, received any portion thereof. We find nothing in the record bringing the case within any of the provisions of title 7 of chapter 10 of the Revised Statutes of Idaho. Judgment of district court is reversed, with costs to appellant. Cause remanded to district court, with instructions to enter judgment for plaintiff as prayed in complaint.

Sullivan, C. J., and Quarles, J., concur.

(November 19, 1898.)

CORNWELL v. CARTER.

[55 Pac. 1100.]

See syllabus in case of *Cornwell v. McCoy*, ante, p. 219; that opinion governs this case.

APPEAL from District Court, Nez Perces County.

J. E. Babb, for Appellant.

Same brief as in *Cornwell v. McCoy*.

S. C. Herren, for Respondent.

Same brief as in case of *Cornwell v. McCoy*.

Argument for Appellant.

HUSTON, J.—This case arising upon the same state of facts as *Cornwell v. McCoy*, ante, p. 219, 55 Pac. 240, it was stipulated by counsel that the decision in that case should control in this. Judgment of district court reversed, with costs to appellant. Cause remanded to district court, with instructions to enter judgment for plaintiff as prayed in complaint.

(November 22, 1898.)

ALSPAUGH v. REID.

[55 Pac. 300.]

AVERMENTS OF ANSWER—NEW MATTER—DEEMED DENIED.—Under the provisions of section 4217, Revised Statutes, when new matter is pleaded in the answer in avoidance or as constituting a defense or counterclaim, such new matter is deemed denied or controverted by the plaintiff.

STATUTE OF LIMITATIONS.—When the statute of limitations of a foreign state is set up as a defense it is error for the court on motion, without a trial, to render a judgment of dismissal for the reason that the plaintiff under the provisions of said section 4217, Revised Statutes, is deemed to have controverted the new matter thus set up as a defense and the defendant is put on his proof. The plaintiff may deny the existence of such statute of limitations as pleaded or may confess and avoid it in any manner the law permits.

JUDGMENT ON PLEADINGS.—Judgment on the pleadings cannot be entered so long as there remains material issues of fact raised by the pleadings undetermined.

(Syllabus by the court.)

APPEAL from District Court, Nez Perces County.

James E. Babb, for Appellant.

All new matter in an answer is deemed controverted, and plaintiff can, on the trial, introduce evidence, either in denial or confession and avoidance of the new matter. Hence, a judgment cannot be rendered based on facts alleged in the answer without a trial. (Rev. Stats., sec. 4217; *Curtis v. Sprague*, 49 Cal. 301; *Colton L. & W. Co. v. Raynor*, 57 Cal. 588; *Will-*

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iams v. Dennison, 94 Cal. 540, 29 Pac. 946; *Rankin v. Sisters of Mercy*, 82 Cal. 88, 22 Pac. 1134-1136.) Plaintiff would have the right, either to deny the existence of the statutes of North Carolina, set forth in the answer, or to confess them and avoid them by proof of the act of North Carolina. (1 Code N. C. 1883, p. 61, sec. 162; *McCann v. Randall*, 147 Mass. 81, 9 Am. St. Rep. 666, 17 N. E. 75; *Armfield v. Moore*, 97 N. C. 34, 2 S. E. 347.) The court will not take judicial notice of statutes of other states, under which an action might be barred by section 4079 of the Revised Statutes of Idaho. (*Richardson v. Mackay*, 4 Okla. 328, 46 Pac. 546; *Allen v. Allen*, 95 Cal. 184, 30 Pac. 214; Rorer on Interstate Law, 238; *Gillett v. Hall*, 32 Iowa, 220.) Even if the facts alleged in the answer were admitted instead of controverted, and even without the statute of North Carolina. (*Luce v. Clarke*, 49 Minn. 356, 51 N. W. 1162; *Wooley v. Yarnell*, 142 Ill. 442, 32 N. E. 891; *Hyman v. McVeigh* (Ill.—unreported); *Gt. W. Tel. Co. v. D. P. Stubbs*, 55 Ill. App. 210.)

Charles L. Heitman, for Respondent.

The complaint upon its face shows the date of the notes and mortgage, and the answer, setting up the North Carolina statute of limitations, shows that it is barred in that state. (*War-mouth v. Hatch*, 33 Cal. 121.) Section 4079 is as much a part of the statute of limitations of the state of Idaho as section 4051. And it is well settled that the statute of limitations of the forum governs. (13 Am. & Eng. Ency. of Law, c. "Limitation of Actions.") "Statute of limitations are, indeed, statutes of repose." (*United States v. Wiley*, 11 Wall. 508.)

SULLIVAN, C. J.—This action was brought to recover on four promissory notes. A demurrer on the ground that the complaint did not state facts sufficient to constitute a cause of action was interposed, and overruled by the court. Thereupon an answer was filed admitting the execution of the promissory notes sued on, and averring that said notes had been fully paid long prior to the commencement of this action. And also the answer avers that this action was barred by the provisions of section 4079 of the Revised Statutes of Idaho, and sets forth

certain sections of the statute of North Carolina under which it was claimed this action was barred by virtue of the provisions of said section 4079 of the Revised Statutes of Idaho. After answering as above set forth, the defendant moved for judgment on the pleadings. The court sustained the motion, and entered judgment of dismissal, from which judgment this appeal was taken.

It appears from the record that the trial court in passing on defendant's demurrer to the complaint held that the complaint stated a cause of action. Thereafter the defendant answered as above set forth, and then moved for judgment on the pleadings. Said motion was "based on the ground that the complaint set out four causes of action on four several promissory notes, the last of which was due on September 1, 1895, and said notes were made in Winston, North Carolina, and payable to the plaintiff at the First National Bank of Winston, North Carolina; and the answer sets out the statute of limitations of North Carolina, and pleads the same as a bar to their recovery, wherein it is shown that the said four causes of action are barred by the statute of limitations." The foregoing quotation is from said motion. The complaint avers that said promissory notes were made and delivered at Lewiston, Idaho. The answer denies that allegation, and avers that said promissory notes were made and delivered at Winston, N. C. The complaint, on its face, does not show that said causes of action were barred by the statute of limitations. Pleading the statute of limitations of North Carolina by way of answer is deemed controverted or denied under the provisions of section 4217, of the Revised Statutes. Said section *inter alia*, provides that the statement of any new matter in the answer in avoidance, or constituting a defense or counterclaim, must, on the trial, be deemed controverted by the opposite party. Hence, a judgment cannot be rendered, based on new matter averred in the answer, without a trial, as all new matter thus pleaded is deemed denied by the opposite party, and the party averring such new matter is put on his proof. (*Curtiss v. Sprague*, 49 Cal. 301; *Water Co. v. Raynor*, 57 Cal. 588; *Williams v. Dennison*, 94 Cal. 540, 29 Pac. 946; *Rankin v. Sisters of Mercy*, 82 Cal. 88, 22 Pac.

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1134.) Under the issues as made by the pleadings in the trial of the action, the plaintiff would have the right to show the nonexistence of the statute of limitations of North Carolina as set out in the answer, or to confess it, and avoid it in any manner that the law might permit. For instance, it might be shown, if possible to do so, that by the laws of North Carolina, when a cause of action arises against one absent from that state, the statute of limitations does not commence to run until such person has returned to the state, and that such facts applied to the defendant in this case. There were issues of fact raised by the pleadings which required evidence to establish before the court could intelligently determine whether such issues were with the plaintiff or defendant. Therefore the court erred in granting judgment of dismissal without hearing the evidence upon such issues and thereafter deciding them. The statute of limitations was pleaded as a defense, and the scope and very existence of such statute was put in issue. That defense being new matter under the provisions of said section 4217 of the Revised Statutes, was deemed controverted by the plaintiff. Judgment on the pleadings cannot be granted as long as there are material issues undetermined.

Counsel for appellant asks us to determine whether this cause of action arose in North Carolina. From the record we are unable to determine that question of law. The cause of action arose *eo instanti* when default in payment occurred, according to the terms of the promissory notes. As a time and place were specified for payment, the presumption would be that the cause of action arose then and there, in case payment was not made. If the defendant was absent from the state at that time, under statutes of limitations generally the bar of the statute would not commence to run until the opportunity to bring the suit occurred. As to what the statute of limitations of North Carolina is so far as the question under consideration is concerned is a matter of allegation and proof. Counsel for appellant cites *Luce v. Clark*, 49 Minn. 356, 51 N. W. 1162. In that case the court asks the question: "When is a cause of action deemed to have arisen in a particular state, territory or country within the meaning of this statute?" referring to the statute of limitations,

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and answers the question as follows: "All statutes of limitations in prescribing the periods have reference for the beginning of such periods to the time when the opportunity to commence the action arises." The judgment of the court below is reversed, and the cause remanded for further proceedings. Costs of this appeal are awarded to the appellant.

Huston and Quarles, JJ., concur.

ON REHEARING.

(December 17, 1898.)

Per CURIAM.—The court does not decide in what state this cause of action arose, and we did not deem it necessary for us to decide that question. If the cause of action arose in the state of North Carolina, and the defendant was not in that state at that time, the statute of limitations would not begin to run as to him until he returned to that state. In case he did not return, the holder of the notes might sue him in Idaho, if he was found there. So far as the statute of limitations is concerned, if that of North Carolina is the same as that of Idaho, the running of said statute would not begin until the date that an opportunity to commence the suit had occurred. A cause of action would arise if payment was not made as stipulated. A person may have a cause of action, and not be able to bring his suit because of the absence of the defendant from the state. In that case the statute of limitations would not begin to run until an opportunity to get service of summons had occurred. In *Luce v. Clarke*, 49 Minn. 356, 51 N. W. 1162, the court there is considering when a cause of action arises with reference to the statute of limitations, and holds that it does not arise until the time when the opportunity to commence the action arises; and we think the rule there laid down correct. The cause of action might have arisen long prior to such time, as one may have a cause of action long before he can bring his suit, because of the absence from the state of the defendant. Petition for rehearing denied.

Argument for Appellant.

(November 22, 1898.)

STEFFY v. ESLER.

[55 Pac. 239.]

DEED TO MINING PROPERTY—CONSIDERATION—CANCELLATION OF DEED.—Where S. executed and delivered to E. a deed of a one-fourth interest in certain mining property for the consideration of E. paying certain indebtedness contracted by E. and S. in working of such property as copartners, and also a certain note and mortgage executed by S. and the release of S. from any and all liability upon such indebtedness, and it was understood and agreed by and between said parties that said deed was not to become operative or to pass title until such payment had been made by E., *held*, that on the refusal of E. to make said payments or comply with said conditions, S. was entitled to have such deed canceled.

APPEAL—STATEMENT ON MOTION FOR NEW TRIAL.—Under section 4818, Revised Statutes of Idaho, providing that any statement used on motion for a new trial may be considered on an appeal from a final judgment, what purports to be a statement on motion for new trial cannot be considered, it not appearing that any motion for a new trial was made.

(Syllabus by the court.)

APPEAL from District Court, Kootenai County.

John R. McBride, for Appellant.

A deed in escrow is a familiar transaction, but a deed regularly made, acknowledged and delivered by the grantor to the grantee, and yet not a deed, would certainly be a most remarkable transaction between two business men dealing with valuable property. There is no fraud alleged or claimed, but a deed is made and delivered which on its face bears no evidence of any condition precedent or subsequent, and yet the party declares it was no deed in fact. An attempt to defeat the most solemn act a man may do, by parol evidence that it was never what it purported to be, with no pretense of any fraud practiced upon him, is certainly an anomalous claim. (Devlin on Deeds, sec. 976.) The engrafting of a contemporaneous condition on a deed in a proper action will be al-

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lowed only on clear evidence of fraud, accident or mistake. (Wharton on Evidence, sec. 1050; *Wallace v. Baker*, 1 Binn. 610; *Marshalltown High School v. Iowa Synod*, 28 Iowa, 360; *Galveston etc. Ry. Co. v. Pfeuffer*, 56 Tex. 66; *East Line R. R. Co. v. Garrett*, 52 Tex. 133.)

Charles L. Heitman, for Respondent.

This suit is brought for the purpose of procuring the cancellation of a deed which is set forth in the pleadings herein. The issue is between the original parties to the deed. The contention of the respondent is, that the deed covering the property in controversy was never in fact delivered as a present contract unconditionally binding upon the respondent according to its terms from the time of such delivery, but was left in the hands of the appellant to become absolute in the event of the appellant doing certain things, to wit, paying certain debts and sums of money as set forth in the complaint. In other words, the deed upon which this suit is based was not, except in a named contingency, to become a contract or a deed absolute. In support of this contention respondent relies upon the case of *Burke v. Dulaney*, 153 U. S. 229-239, 14 Sup. Ct. Rep. 816. (*Ware v. Allen*, 128 U. S. 590, 9 Sup. Ct. Rep. 174; *Juilliard v. Chaffee*, 92 N. Y. 529, 535; *Reynolds v. Robinson*, 110 N. Y. 654, 18 N. E. 127; *McFarland v. Sikes*, 54 Conn. 250; *Wiard v. Brown*, 59 Cal. 194, 1 Am. St. Rep. 111, 7 Atl. 408; *Roundtree v. Smith*, 152 Ill. 493, 38 N. E. 680; 2 Devlin on Deeds, sec. 822.)

HUSTON, J.—This is an appeal from a judgment rendered by the district court for the county of Kootenai. Notice of intention to move for a new trial was filed and served, but no motion for a new trial was ever made or passed upon by the court. The record contains what purports to be a statement on motion for a new trial, but, as no motion for a new trial was ever made or passed upon by the court, such statement cannot be used on this appeal. Section 4818 of the Revised Statutes of Idaho provides: "Any statement used on motion for a new trial or settled after decision of such motion, when the motion is made upon the minutes of the court, as provided in section 4443, or any bill of exceptions settled, as provided in sections 4429 or

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4430, or used on motion for a new trial, may be used on appeal from a final judgment equally as upon appeal from the order granting or refusing the new trial." The language of the statute is plain, and its purpose obvious. To have permitted the use, on appeal, of a statement of facts, which had never been examined or passed upon by the trial court, would be contrary to the recognized principles which regulate and control appellate proceedings, as well as a palpable injustice to the trial court. (*Brind v. Gregory*, 130 Cal. 640, 53 Pac. 25.)

The elimination of the statement from the record leaves only the judgment-roll to be considered by this court. Appellant objects that the complaint does not state a cause of action. The complaint states that the deed, for the cancellation of which this action is brought, was executed and delivered by plaintiff to defendant "upon the express agreement and understanding that the title to said undivided interest in said mining claims, as hereinbefore set forth, should not vest in the defendant, but should remain in the plaintiff until the full performance by the defendant of said condition precedent, to wit, the payment by the defendant of the said sum of \$386.25, with the accrued interest thereon, so due from plaintiff on his note and mortgage to A. Lund, as aforesaid, and the release of the plaintiff from said indebtedness, and the payment by defendant of the said sum of about \$825, so due and owing from plaintiff and defendant to different individuals, as hereinbefore set forth, and the release of plaintiff from said indebtedness"; and this is, in substance, repeated in the complaint, and is followed by the averment that the defendant had failed and refused to comply with or perform any or either of said conditions precedent to the passing of any title by, or establishing the validity of, said deed; that plaintiff had demanded of defendant a performance of the said conditions precedent by him, and, upon refusal, had demanded a reconveyance of the property by defendant, which was also refused—all of which facts alleged in the complaint are by the trial court found to be true.

Counsel for appellant does not, we think, state the whole case made by the plaintiff when he says: "Plaintiff made the deed for the consideration that Esler [the defendant] should pay

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debts that he was already bound for." The plaintiff was personally liable for all the indebtedness mentioned, and, as alleged in the complaint and found by the court, was to be released from such indebtedness by its payment by the defendant, and it was in consideration of such payment and release that he consented to part with his property. "As no particular form of delivery is required, the question whether there was a delivery of a deed or not, so as to pass title, must, in great measure, where it is not clear that an actual delivery has been effected, depend upon the particular circumstances of each particular case." (1 Devlin on Deeds, sec. 262.) The trial court finds in this case "that the quitclaim deed so given by the plaintiff to the defendant on the eleventh day of August, 1897, was never an executed contract, and that the plaintiff is to have the said deed surrendered and canceled," etc. Upon the record presented to us we find no error in the judgment and conclusions of the district court. The judgment of the district court is affirmed, with costs to the respondent.

Sullivan, C. J., and Quarles, J., concur.

(November 26, 1898.)

GIFFEN v. CITY OF LEWISTON.

[55 Pac. 545.]

DAMAGES—DEFECTIVE SIDEWALK—SIDEWALK INCLUDED IN STREETS AND PUBLIC GROUNDS.—A sidewalk is included within the term "streets and public grounds" as used in a city charter which makes the city "liable to anyone for damages sustained by accident or casualty . . . on account of the condition of any street or public ground" within the city.

CITY CHARTER—CONTRIBUTORY NEGLIGENCE.—The provision in a city charter that such city "shall be liable to anyone for any loss or injury to person or property growing out of any casualty or accident happening to any such person or property on account of the condition of any street or public ground therein," does not deprive the city of the ordinary defense of contributory negligence to an action brought against it for damages brought under such charter provision.

Points decided.

SAME—ACCOUNTS—DOES NOT APPLY TO TORTS.—A provision in a city charter that "all demands and accounts against the city must be presented to the clerk with the necessary evidence in support thereof, and he must submit the same to the council, who shall by a vote direct whether the same shall be paid or any part thereof, as they may deem it just and legal," does not apply to torts, but to those demands upon which actions *ex contractu* may be brought.

INSTRUCTIONS.—Contradictory instructions upon a material issue held to be ground for reversal.

INSTRUCTIONS AS TO NEGLIGENCE.—In a suit against a city to recover for personal injury growing out of a defective sidewalk, the court instructed the jury that "negligence on the part of the plaintiff resulting in the injury and without which the injury would not have occurred, would not excuse the city from liability when the city officials had notice of such defect, or could have known of it by the use of reasonable diligence, in time to have prevented it"; held, reversible error, as such instruction took from the jury the defense of contributory negligence under the facts of the case at bar.

PERSON INJURED KNOWING DANGEROUS CONDITION OF STREET.—

Where a person knew prior to an injury received of a dangerous condition in a street, such knowledge would not preclude him from a recovery for an injury received by accident caused by such dangerous condition, provided he used reasonable diligence to avoid injury; but should injury result from his carelessness, he should not recover for such injury.

PRACTICE.—In making an opening statement to the jury counsel has no right to state his views of the law of the case. Such opening statement should be confined to pointing out the issues made by the pleadings, and stating the facts which the party expects to prove.

MEASURE OF DAMAGES—COMMUNITY PROPERTY.—Loss of ability to labor is an element of general damage to be considered by the jury in an action brought by husband and wife to recover for a tortious injury to the wife, the amount so recovered being, under the laws of Idaho, community property of both husband and wife.

INTERROGATORIES TO JURY—SPECIAL VERDICT.—The submission of interrogatories to the jury for the purpose of obtaining a special verdict is largely a matter of discretion, and it is not an abuse of such discretion to refuse to submit such interrogatories in a cause when the issues are not complicated.

PRACTICE—PREJUDICIAL ERROR.—In an action against a city to recover for an injury received by reason of the dangerous condition of a street, it is prejudicial error to permit the plaintiff to show that after the accident the defendant promptly remedied the defect which caused the accident.

Argument for Appellant.

BEHAVIOR OF COUNSEL ON THE TRIAL.—It is not proper for counsel, while arguing a cause to the jury, to question the motives of opposing counsel in objecting to the introduction of evidence on the ground that it is immaterial, incompetent or irrelevant.

PRACTICE—INTRODUCTION OF EVIDENCE.—The practice of opening a case to permit a party to introduce evidence in chief, after he has closed his case, while a matter of discretion in the trial court, should be discouraged to the extent of requiring the moving party to show good excuse, such as inability to produce before closing that the evidence was discovered afterward or other good reason.

DAMAGES—DISFIGUREMENT AN ELEMENT OF.—Disfigurement caused by a tortious injury is an element of general damage, but annoyance caused by contemplation of such disfigurement is too remote to be considered as an element of damage.

EVIDENCE—PRECAUTION—ACCIDENT.—The presence of a light at the place of accident does not excuse a city, which is required to keep its streets in safe condition, from liability for an accident caused by one of its streets being in a dangerous condition, but the presence or absence of such light is a circumstance to be considered by the jury in determining whether the plaintiff was, or was not, guilty of contributory negligence.

VERDICT—RESORT TO CHANCE.—A verdict which is reached as the result of resort to chance should be set aside, and the affidavit of a juror is competent under the provisions of section 4439, Revised Statutes of Idaho, to show that the verdict was reached by resorting to chance.

EVIDENCE—WITNESS ALLOWED TO EXPLAIN HIS TESTIMONY.—It is not error to permit a witness to make an explanation of statements made by him on the witness-stand or to permit him to correct any mistake he may have made in giving his evidence, care being exercised to prevent such witness straying away from the issues, or making improper statements.

VERDICT—TO WHOM TO RUN.—In an action by husband and wife to recover damages for injuries received by the wife, the verdict and judgment should run to both husband and wife.

(Syllabus by the court.)

APPEAL from District Court, Nez Perces County.

James W. Poe and James E. Babb, for Appellant.

At common law a city was not liable for personal injuries resulting from the condition of a street or sidewalk. Section 93 of the charter of defendant city recognized the common law, and particularly repealed it—i. e., repealed it by establishing liability to anyone for any injury happening on account of the

Argument for Appellant.

condition "of any street or public ground therein," leaving the common-law exemption from liability on account of the condition of "sidewalks" unimpaired. Hence, defendant was not liable for the injury complained of which resulted on account of the condition of a sidewalk. (See 24 Am. & Eng. Ency. of Law, 88, where many authorities are cited in note 1; *Wimbighier v. Los Angeles*, 45 Cal. 36; *Tranter v. Sacramento*, 61 Cal. 271; *Chope v. Eureka*, 78 Cal. 588, 12 Am. St. Rep. 113, 21 Pac. 364; *Arnold v. San Jose*, 81 Cal. 618, 22 Pac. 877.) Section 7, page 148, of the Special and Local Laws of Idaho, where the expression is "streets, highways, alleys and sidewalks, crosswalks and gutters." The legislature has thus given its own definition of what the word "street" in that charter includes. The word "street" has been held not to include "sidewalk." (*Hunnelman v. Utterlee*, 50 Cal. 68; *Dyer v. Chase*, 52 Cal. 440; *Philadelphia v. Lea*, 9 Phila. 106; *Dickinson v. Worcester*, 138 Mass. 555; *City of Detroit v. Putnam*, 45 Mich. 263, 7 N. W. 815.) If the court should hold that the provision of section 93 of the city charter for liability on account of the condition of any "street" includes liability on account of the condition of any "sidewalk," defendant is nevertheless not liable in this case, because there had never been any sidewalk beyond the point where the sidewalk in question terminated, and the absence of continuation of which caused the accident. As the liability would arise only because of the condition of the sidewalk, and the accident happened, only, because of the absence of a sidewalk, this action will not lie. (*Williams v. City of Grand Rapids*, 59 Mich. 51, 26 N. W. 279; *Dillon on Municipal Corporation*, sec. 494; *City of Lansing v. Toolan*, 37 Mich. 152; *Marquette v. Cleary*, 37 Mich. 296; *Saulsbury v. Ithaca*, 94 N. Y. 30, 46 Am. Rep. 122; *Urquhardt v. Ogdensburg*, 91 N. Y. 67, 43 Am. Rep. 655; *Hines v. Lockport*, 50 N. Y. 528; *Mills v. Brooklyn*, 32 N. Y. 489; *Shietart v. City of Detroit*, 108 Mich. 309, 66 N. W. 221.) The eyesight of the plaintiff, Mary Giffen, was defective at the time of the accident and had been so for a long time. Her husband, John Giffen, was walking behind her some few feet at the time of the accident. He was not protecting her as he should have done, in view of the well-known condition of the sidewalk, the darkness of the night and her de-

Argument for Respondents.

fective eyesight. The contributory negligence either of Mary Giffen or John Giffen is sufficient to defeat the action. She cannot recover if either of them was guilty of negligence which contributed to the injury. (*McFadden v. Santa Ana etc. Ry. Co.*, 87 Cal. 464, 25 Pac. 681; *Pittman v. El Reno*, 4 Okla. 638, 46 Pac. 495; *McGraw v. Friend & Terry Lumber Co.*, 120 Cal. 574, 52 Pac. 1004.) Damage resulting from the wife's decreased ability to labor can only be recovered in an action by the husband alone, and the evidence admitted upon that subject in this case was prejudicial error. It was outside the issues—the complaint claimed no such damages. (*McKune v. Santa Clara Mill etc. Co.*, 110 Cal. 480, 42 Pac. 980; *Tell v. Gibson*, 66 Cal. 247, 5 Pac. 223; *McFadden v. Railway Company*, 87 Cal. 464, 25 Pac. 681; Addison on Torts, 952; *Filer v. New York Cent. R. R. Co.*, 49 N. Y. 47, 10 Am. Rep. 327, *Uransky v. Dry Dock etc. Co.*, 118 N. Y. 304, 16 Am. St. Rep. 759, 23 N. E. 451.) The court erred in refusing to submit to the jury the questions, and each of them, requested by defendant to be submitted to the jury for answer. (*Burke v. McDonald*, 3 Idaho, 296, 33 Pac. 49; *City of Weir v. Herbert*, 6 Kan. App. 596, 51 Pac. 582; *City of Wyandott v. Gibson*, 25 Kan. 236.) The instructions of the court authorizing the jury to consider as an element of damages the disfigurement of plaintiff, also annoyance resulting from disfigurement, were error. (*Chicago & R. Co. v. Hines*, 45 Ill. App. 299.) The verdict should be set aside because of the jury having resorted to the determination of chance in ascertaining the amount of damages to be awarded. (*Flood v. McClure*, 3 Idaho, 587, 32 Pac. 254; *Gordon v. Trevarthan*, 13 Mont. 387, 40 Am. St. Rep. 452, 34 Pac. 185; *Frick v. Reynolds*, 6 Okla. 638, 52 Pac. 391.)

James W. Reid, for Respondents.

Where by the charter of a municipal corporation, it had power to repair streets and sidewalks and to prevent the encumbering in any manner, "or obstructing the same," held, that it was liable for injuries occasioned by an omission on its part to repair or remove a sidewalk constructed without its authority, which had been for a sufficient length of time to charge it with

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notice in so defective a condition as to be dangerous for travel. (*Saulsbury v. Ithaca*, 94 N. Y. 27, 46 Am. Rep. 122; *Jones on Negligence of Municipal Corporations*, c. 11; *Cooley on Torts*, 625, 626, and cases there cited.) The fourth contention of appellant of contributory negligence, sections 206 and 228, and cases cited, in *Jones on Negligence of Municipal Corporations*, cover this point thoroughly. When jurors agree each one to mark down the sum he thinks proper to find as damages, and then to divide the total amount of those sums by the number of persons composing the jury, which result should be their verdict, a verdict thus found is irregular and will be set aside, but if such means be adopted merely to arrive at a proper result for the purpose of determining what the verdict shall be and afterward the jury agrees upon such sum as their verdict, the court will not disturb it. (*Wilson v. Berryman*, 5 Cal. 45, 63 Am. Dec. 78; *Dixon v. Pluns*, 98 Cal. 384, 35 Am. St. Rep. 180, 33 Pac. 268; *Turner & Platt v. Toulumne County Water Co.*, 25 Cal. 398; *Simons v. Mills*, 80 Cal. 120, 22 Pac. 25; *Hunt v. Elliott*, 77 Cal. 588, 20 Pac. 132; *Boyce v. Stage Co.*, 25 Cal. 402.) The next contention is that the judgment is illegal because made to the wife only. (Idaho Rev. Stats., secs. 4093; 3 Deering's Code, sec. 370, and notes; *Colvill v. Langdon*, 22 Minn. 565; *Mann v. Marsh*, 35 Barb. 68; *Ackley v. Tarbox*, 31 N. Y. 564; *Wilson v. Wilson*, 36 Cal. 447, 95 Am. Dec. 194; *Sheldon v. Steamship Uncle Sam*, 18 Cal. 526, 79 Am. Dec. 193; *Warner v. Steamship Uncle Sam*, 9 Cal. 697; *Pomeroy on Remedies*, secs. 242, 244.)

QUARLES, J.—This action was commenced by John Giffen and his wife, Mary Giffen, to recover damages for personal injuries received by the latter owing to the alleged unsafe condition of a certain sidewalk situated in the municipality, defendant herein. The complaint alleges that "the said sidewalk on said street, opposite what is known as the 'Methodist Church' in said city, was left in a dangerous condition, by having the planks torn off, and a sudden descent and abrupt termination of said sidewalk, so that it became highly dangerous to walk or pass upon it in that condition; and that the said dangerous condition of said sidewalk was wrongfully and negligently, and

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with full knowledge of the existence thereof, suffered by said defendant to remain exposed and unimpaired, with no protection around the same, and with no lights or other signals thereat during the night-time to indicate danger during the night" of the date of the alleged injury. The complaint then alleges that while the said plaintiffs were traveling on foot over said sidewalk, and without knowledge or means of knowing of the existence of said defect therein, the plaintiff, Mary Giffen, by reason of such defect, received a fall, whereby she sustained injuries to her damage in the sum of \$2,500. The defendant answered. The cause was tried before the court and a jury, and a verdict rendered in favor of the plaintiff, Mary Giffen, in the sum of \$800, upon which verdict the court rendered judgment in favor of said plaintiff Mary Giffen, for the sum of \$800 and costs of suit, taxed at \$82.55. The defendant moved for a new trial, which motion was denied; and from the said judgment, and the order denying a new trial, the defendant appeals, and on appeal the defendant has specified forty-nine errors.

Section 7 of the charter of the city of Lewiston (Special and Local Laws of Idaho, page 148, section 655) provides for "clearing, opening, . . . and repairing streets, highways and alleys, sidewalks and gutters." Section 93 of said charter (Special and Local Laws of Idaho, page 163, section 721) is as follows: "The city of Lewiston shall be liable to anyone for any loss or injury to person or property growing out of any casualty or accident happening to any such person or property on account of the condition of any street or public ground therein." It is earnestly urged by counsel for the defendant that these provisions in said charter, while making the defendant responsible for injury received owing to a defect in one of its streets, yet that such provisions do not make the defendant liable for injury received through a defect in one of its sidewalks. This contention we regard as technical. The expression "street or public ground" was evidently intended to embrace all public ground within the corporate limits of the defendant city, whether used as a public park, a street, alley or sidewalk. By the terms of the charter, taken as a whole, the control of all public grounds, whether used for a street, alley, sidewalk or other purposes, with-

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in the corporate limits of said city, is vested in the defendant, and the defendant made liable for the dangerous condition of the same. The common-law rule exempting a city from liability for the unsafe and dangerous condition of its streets has no application to the case at bar, for the reason that such liability is created by the charter of the defendant city.

The defendant objected to the introduction of any evidence by the plaintiffs, on the ground that the complaint did not state facts sufficient to constitute a cause of action. This contention was based upon the idea that the city was not liable for the unsafe condition of its sidewalks, and this objection is urged with much force in the brief of the appellant, but, for the reasons above given, was properly overruled. We presume that the argument in support of the objection presented to the court below was the same as that urged here.

Appellant contends that the defendant was not liable for the reason that at the point where the sidewalk terminated, and where the injury occurred, there was no defect in the sidewalk, but the absence of any sidewalk. This argument is rather unique when considered with other arguments in appellant's brief. We are first told that the sidewalk is no part of the street, and that, therefore, the city is not liable for injuries received by reason of defects in the sidewalk. Then we are told that, if that part of the street upon which sidewalks are usually constructed is in a dangerous condition, the city is not liable, because there is no sidewalk there. The case under consideration is different from those cases where the sidewalk naturally and necessarily terminates; i. e., the corner of a block in a city. The evidence in this case shows that the injury complained of by the plaintiffs occurred upon that part of a certain street in the city of Lewiston appropriated for the use of pedestrians; that the point where it occurred was the terminus of a plankway which had been laid upon a portion of this sidewalk; that, the terminus of such plankway was not at the corner or intersection of two streets, but distant from any such intersection; that by reason of the elevation of said plankway above the ground at the point where the injury occurred, such sidewalk was in a dangerous condition. The jury concluded from the

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evidence before it that such sidewalk at the point where the injury occurred was in a dangerous condition, and that, by reason of such condition, the plaintiff Mary Giffen was injured, whereby she sustained damages to the extent of \$800. The appellant urged upon the trial, and also upon this appeal, that the plaintiffs were guilty of contributory negligence, and such as precludes a recovery by them in this case.

The appellant contends that the defendant was entitled to judgment for the reason that the plaintiffs did not allege nor prove the presentation of the claim upon which this action was brought. Section 60 of said charter (Special and Local Laws of Idaho, page 157, section 688) provides: "All demands and accounts against the city must be presented to the clerk with the necessary evidence in support thereof, and he must submit the same to the council, who shall by vote direct whether the same shall be paid or any part thereof, as they may deem it just and legal." This charter provision is unlike that found in most charters, inasmuch as it does not expressly prohibit suit against the city upon a demand until after presentation of a claim to the city council for payment. Said section 60 above quoted was not intended, in our opinion, to apply to cases of torts. This view is strengthened by the fact that section 93 of said charter, above quoted, does not require presentation of a claim growing out of a tort to the city council prior to suit. We conclude, therefore, that said section 60 was intended and does apply to claims upon which actions *ex contractu* may be brought, and that said section 93 is the only provision in said charter affecting or controlling the right of a party injured to sue the city for tort. The correct rule, we think, is laid down by Dillon, in his work upon Municipal Corporations (fourth edition, section 837), in the following language, to wit: "In furtherance of a public policy to prevent needless litigation, and save unnecessary expenses and cost, by affording an opportunity amicably to adjust all claims against municipal corporations of every nature before suit is brought, it is provided in the charters of such corporations that no action shall be maintained upon any claim or demand until the claimant shall first have presented his claim or demand to the common council for allowance. In other

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charters it is propided that no action on a contract, obligation, or liability shall be commenced except within one year or other short limitation period after the cause of action shall have accrued. These provisions have been held to be inapplicable to actions for personal torts; yet a similar charter provision, with the addition of the word ["claim" or "demand"] whatsoever, was held to include torts. The failure to comply with such provision constitutes a good defense."

The court instructed the jury that the defendant was required to use reasonable diligence to keep its streets, sidewalks, and other public ground in safe condition. Such instruction was undoubtedly correct. The court of its own motion then gave an instruction defining contributory negligence, and then gave the following instructions: "I instruct you, gentlemen of the jury, that, although, you may believe from the evidence that the city authorities had negligently suffered the sidewalk in question to remain in dangerous condition for walking, still if you further believe from the evidence that this condition of the sidewalk was known to the plaintiffs, or either of them, before they attempted to walk over it, and that they might easily have avoided passing over such dangerous place, then they were not using that reasonable care and prudence to avoid injury which the law requires, and cannot recover in this case." "You are instructed, gentlemen of the jury, that a person has no right knowingly to expose him or herself to danger, and then recover damages which might have been avoided by the use of reasonable precaution; and if the jury believe from the evidence that the plaintiffs, or either of them, before and at the time of the alleged injury, knew of the defect in the sidewalk, and, in going to their house on the night of the alleged injury, could have taken another and safer route, of equal or nearly equal distance, then the jury have the right to consider their failure to take such other route, if such there was, into consideration in determining whether the plaintiffs were at the time of the injury, exercising due care and caution for their own safety. The jury are instructed that when a dangerous place is made in the street by the unlawful act of third parties, unknown or without the knowledge or consent of the city authorities, the city cannot be deemed negligent until

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the knowledge or notice of such defect is brought home to the officers of the city, unless the dangerous place has existed for such length of time before the injury that the city authorities, in the exercise of reasonable care and diligence, might and ought to have known of its existence." But, notwithstanding said instructions, the court further instructed the jury as follows, to wit: "If you believe from the evidence that the defendant was guilty of negligence in not keeping the sidewalk in question in a safe condition and free from danger, as explained in these instructions, upon the occasion referred to, and that the plaintiff, Mary Giffen, was injured thereby, as alleged in the complaint, and that she sustained damages by reason thereof, and that plaintiffs, or either of them, were guilty of such negligence as contributed to the injury, and without which accident would not have happened, still the defendant would be liable in this case provided you further believe from the evidence that the said defendant, the city of Lewiston, had notice of the danger to which the plaintiffs were exposed, in time to have averted it, and, by the exercise of ordinary, reasonable care and prudence, could have averted the injury." The giving of this latter instruction was duly excepted to by the defendant. Such instruction is contradictory to other instructions given, took from the jury the question of contributory negligence, provided they obeyed it, and disregarded the other instructions. The giving of this latter instruction was palpable error. The instructions, taken as a whole, tended to mislead and confuse the jurors; and it is impossible to determine from the evidence in the case, and the instructions given, as a whole, whether or not the jury found that the plaintiffs were guilty of contributory negligence or not. The evidence upon this point was conflicting.

The defendant requested the court to give instruction No. 15, in the following words: "The court instructs the jury that if a person knows there is a dangerous place in a sidewalk, and attempts to use the walk, and in consequence of the darkness of the night, or by reason of the defective eyesight, such person is unable to determine the exact location of the point of danger, such person has no reason to complain by reason of the fact of inability to cross the place in safety." This request was re-

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fused by the court, to which refusal the defendant duly excepted. The refusal to give such instruction, we think, was proper, as it was not applicable to the facts in the case at bar. Although the plaintiffs may have known of the defect in the sidewalk complained of, yet such knowledge would preclude the plaintiffs from recovering in the case at bar, provided the plaintiffs used reasonable care to prevent injury. To rebut the idea of contributory negligence, the plaintiffs introduced evidence showing that the injury occurred at night; that the night was very dark; that plaintiffs were carrying a lantern, lighted up to a short time previous to the accident, but which had been extinguished by a gust of wind just prior to the time the accident occurred, leaving the plaintiffs in total darkness; and that while walking along the sidewalk in a careful, leisurely manner, the plaintiff, Mary Giffen, who was slightly in advance of her husband, the other plaintiff, unexpectedly reached the end of the said plankway, stepped off, and fell, receiving severe injuries. The plaintiffs denied knowledge of the condition of said sidewalk, but on this point there is conflicting evidence. The two primary questions for the jury to pass upon, and upon which the court should have instructed them, are: 1. Was the said sidewalk in a dangerous condition, resulting from a lack of the exercise of reasonable care on the part of the officials of the city of Lewiston? And 2. Did the plaintiffs, at the time and place where the accident occurred, use reasonable care to avoid accident?

The instructions, taken as a whole, although containing much unnecessary verbiage and redundancy, gave the law of the case fairly to the jury, with the exception of the last instruction quoted above, which tended to eliminate the question of contributory negligence. While the language of section 93 of said charter, making the defendant city "liable to anyone for any loss or injury to person or property growing out of any casualty or accident happening to any such person or property on account of the condition of any street or public ground therein," is very broad, yet we do not think that it was the intention of the legislature to deprive the defendant of the ordinary defense of contributory negligence. Suppose the defendant, as is

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usual, should excavate a large cistern in one of its streets, using reasonable diligence to prevent accident to travelers upon such street, and, while such cistern is under process of construction, a traveler upon such street, either in the daytime or at night, sufficient natural or artificial light being there to enable him to see the excavation, should, seeing the excavation, intentionally walk into it, whereby he was injured greatly; would it be held, under the provisions of such charter, that the defendant would be liable to such traveler? We think not. To so hold would violate an ancient maxim, "No one shall take advantage of his own wrong." On the other hand, if the defendant should permit this excavation, or any other obstruction or defect, to remain unguarded, without signal lights pointing to the danger, the defendant would be liable to a passer-by, who, in the dark, should be injured by reason of such condition of the street, although, perchance, such injured party may have seen at some prior time such defective condition of the street. We think the rule is this: Although the plaintiffs may have previously seen the defect in the sidewalk in question, such notice would require them to use reasonable diligence to avoid accident by reason of such defect, but would not preclude them from a recovery in case of accident, and while using reasonable diligence to prevent such accident. It is a duty imposed by its charter upon the defendant to keep all of its highways, including streets, sidewalks, and alleys, in reasonably safe condition for travel; and a traveler upon any highway of the defendant who seeks a dangerous defect therein to-day, but who has occasion to travel over such highway at night-time a few days hence, may well conclude that the defendant has performed its legal duties, and repaired such defect; and such traveler may recover for injuries received by reason of such defect, if he uses reasonable diligence to avoid injury, but could not recover for such injury if he carelessly runs into such danger. To illustrate further: say the use of bicycles upon sidewalks is dangerous to pedestrians; that the defendant permits the use of bicycles upon its sidewalks; that A, a traveler, is injured upon the sidewalk by being struck by a bicycle which has noiselessly approached him from behind, he being unaware of its approach—would it

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be a defense to say to A, "You shall not recover damage, because you knew that the sidewalks were dangerous on account of bicycles being used upon them"? Certainly not. Such rule would completely nullify the provisions of section 93 of said charter, quoted. But, knowing that bicycles are used on the sidewalks, A should use reasonable diligence to avoid injury; and he could not knowingly or intentionally run against a bicycle on the sidewalk, and then recover for such injury as he might receive thereby.

In making his opening statement to the jury, counsel for the defendant asked permission to state his views of the law of the case to the jury, which the court refused to permit. The defendant excepted to this ruling of the court, and now assigns said ruling as error. There was no error in said ruling. Counsel, in making opening statements to the jury, are confined to pointing out the issues of fact made by the pleadings, and to a statement of the facts which he expects to prove to sustain his contention.

During the trial, the court, over the objections and exceptions of the defendant, permitted the plaintiff, Mary Giffen, to answer certain questions showing that, by reason of the injury, she could not labor to the extent that she could prior to the accident; and errors 2 to 6, assigned by appellant, are based upon the admission of such evidence. The admission of such evidence was proper. It is alleged in the complaint that, by reason of said injury, the plaintiff, Mary Giffen, "became permanently lame and crippled for life, and has suffered, and still suffers, great mental pain and anguish," etc. Mr. Sutherland, in his admirable work upon Damages (volume 3, at page 259), lays down the rule that loss of capacity to earn money is one of the elements of general damage. In 5 Encyclopedia of Pleading and Practice, under the subject of "Damages," after showing the rule on this point to be conflicting, the text, at page 755, says: "On the other hand, the doctrine has been laid down that loss of earnings and of business engagements is a necessary result of personal injuries, and hence need not be specially pleaded."

But it is urged by the appellant that damages for loss of ability to labor on the part of the wife, caused by an injury of

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the kind in question here, can only be recovered by the husband in a separate action brought for that purpose. We cannot assent to this contention. The rule contended for was the rule at common law, and is doubtless the rule now in those states in which the legal identity of the wife is submerged into that of the husband, and where the time and service of the wife is not, to an extent, her own, but the property of the husband. Under our statutes, the time and earnings of both husband and wife are community property, not owned exclusively by the husband, but the common property of both. In the case at bar, both husband and wife are necessary parties. The judgment should run to both. The damages, after recovery thereof, become the common property of both. But should the marital relation terminate, either by death or otherwise, the wife would be entitled to recover for such injuries, and any damages so recovered by her after the termination of the marital relation would belong to her exclusively. Then, it is the policy of our code to prevent multiplicity of actions. Any damage, general or special, recovered by the husband during the marital relation for loss of time or capacity to labor by the wife in cases like the one at bar becomes community property. Then, our statutes provide that "the earnings and accumulations of the wife and of her minor children living with her or in her custody, while she is living separate from her husband, are the separate property of the wife." (Rev. Stats., sec. 2502.)

At the close of the trial, the defendant requested the court to submit to the jury, by way of special verdict, the following questions, to wit: "First question: Would the injury complained of in this action have happened but for the want of ordinary care on the part of plaintiff John Giffen? Answer: —. Second question: Would the injury complained of in this action have happened but for the want of ordinary care on the part of plaintiff Mary Giffen? Answer: —. Third question: Have you allowed any damages in your verdict on account of diminished ability of Mary Giffen to labor and assist her husband, or on account of any expense to him, and, if so, how much have you so allowed? Answer: —. Fourth question: Did the planks as originally placed at the end of the sidewalk, and slop-

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ing to the ground, make the walk reasonably safe for the public use at that place? Answer: —. Fifth question: Had those planks at the end of the sidewalk, and sloping to the ground, been disturbed or disarranged by the time of the accident to Mary Giffen, from the situation in which they were originally placed there? Answer: —. Sixth question: Did the defendant city have any notice of such disturbance or disarrangement (if there was any) of said sloping planks, before the accident to Mary Giffen? Answer: —. Seventh question: Was the plaintiff Mary Giffen guilty of any want of ordinary care and prudence, however slight, which contributed to produce the injury? Answer: —. Eighth question: Was the plaintiff John Giffen guilty of any want of ordinary care and prudence, however slight, which contributed to produce the injury? Answer: —.” Which request the court refused, to which ruling the defendant excepted, and upon this action of the court the defendant has assigned eight errors (41 to 48, inclusive); and, to support his position, counsel for appellant cites us to the case of *Burke v. McDonald*, 2 Idaho, 679, 33 Pac. 49. The issues in this case were not of a complicated nature, or were not so to the extent contemplated in the decision in *Burke v. McDonald*, *supra*. The submission of special findings to the jury is, to some extent, a matter of discretion with the trial court. But when the issues are complicated, and the questions to be determined by the jury are so numerous or complex that they tend to confuse the jury, it is an abuse of such discretion to refuse to submit interrogatories to the jury. Neither side has an absolute right to have interrogatories submitted in that particular form which may be requested by such party. When either side requests the submission of interrogatories, the trial court should, when the issues are complicated, carefully examine the interrogatories, and see that they cover the material issues in dispute and no others, and that they are plainly and concisely put. The practice of submitting interrogatories to the jury where the issues made by pleading and proof are complicated is a good one, and should be encouraged in every such case when requested, and also where the material questions are numerous although the issues are not complicated, provided

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that, in the opinion of the trial court, a special verdict would assist in arriving at a correct conclusion. Special findings often enable the court to correctly apply the law when, but for such findings, a new trial would be necessarily granted. Thus, in many cases, the ends of justice are promoted, and litigation expedited by special findings. Special findings submitted by proper interrogatories in the case at bar would have been proper; but those requested by defendant were too numerous, and should have been more concise. It would have been proper for the court to have simplified the interrogatories, so as to have covered the material issues in a plain, simple manner, and then have submitted them to the jury.

On the trial, the plaintiffs were permitted, over the objections and exceptions of the defendant, to introduce evidence proving that, soon after the accident, the defect in the sidewalk complained of was repaired by the defendant. This was error. Such evidence was not within the issues. The neglect of the defendant prior to the accident was the important question. If the defendant was guilty of negligence by permitting the sidewalk to remain in a dangerous condition its liability for such negligence is neither aggravated nor mitigated by its promptness or tardiness in repairing a sidewalk after the accident.

Touching another error assigned by the defendant, we deem it proper to say that, in the trial of a cause, counsel should refrain from comments upon the motive of opposing counsel in making objections to the introduction of evidence. Counsel on both sides should be kind and courteous to each other, and confine themselves to legitimate argument.

Appellant also contends that the trial court erred in permitting plaintiffs to introduce evidence in chief, after the close of the case, and after defendant had introduced its evidence. This is a matter largely within the discretion of the trial court. But the practice should be discouraged to the extent of requiring the party to show some reasonable excuse, such as ignorance, of the existence of such evidence, or oversight, inability to produce the evidence before closing, or other good cause, before permitting the plaintiff to open his case after having closed it.

The court instructed the jury that, in passing upon the credibility of the witnesses, "they should reconcile all of the different

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parts of the testimony, if possible, and that it is only when it is palpable that a witness has deliberately and intentionally testified falsely as to some material matter, and is not corroborated as to such statement by other evidence, that the jury is warranted in disregarding the entire testimony of such witness." The defendant excepted to this instruction, on the ground that it "was an infringement upon the province of the jury." There is nothing in the defendant's contention upon this point.

The trial court did not err in instructing the jury that disfigurement of the plaintiff caused by the injury complained of is an element of damage to be considered by them. Such disfigurement is an element of damage; but annoyance to the plaintiff caused by contemplation of disfigurement is too remote to be considered as an element of damage resulting from personal injury.

It was not error to refuse instruction No. 13, asked by the defendant, it being covered by other instructions which were given.

The defendant also requested the court to give an instruction in the following words, to wit: "If the jury believe from the evidence that the city had provided a good light on the street at the place in question, and it had been affording adequate light at the place in question, and that it was burning the night before the accident, even if the jury should find that from some cause it failed to burn at the time of the alleged accident, the city should not be charged with negligence in the matter of the absence of the light." The court refused to give this instruction, to which refusal the defendant excepted, and the appellant urges here that the refusal to give such instruction was prejudicial error. The instruction as prepared was not proper. It would tend to confuse the jury. The jury might conclude from said instruction that the existence of a light at the place of the accident would be a defense to the action. We are unable to see what effect the existence of a light at the place of the accident, the night before the accident, could have upon the rights of the parties, any more than the repairing of the defect in the sidewalk on the day following the accident would have. The primary ground of liability on the part of the appellant for the injury complained of by the plaintiffs is the defective or danger-

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ous condition of the sidewalk. The presence or absence of a light at the place of the accident is only important as tending to throw light on the question as to whether the plaintiffs were guilty of contributory negligence resulting in the injury in question.

The appellant urges that the verdict should be set aside upon the ground that it was arrived at by chance. Five of the jurors made affidavits, each in the same language, apparently one copied from another, to the effect that "the verdict of \$800 was arrived at by agreeing that each juror should name the amount which he considered the plaintiffs entitled to recover, and that the amount so named by each juror should be put down, and that the several sums so named be added together, and that the total amount thereof should be divided by 12, the number of jurors trying the case, and that the sum or quotient arising from such division should be the verdict; that the amount of such division was about \$875, and they then agreed to make it \$800; and that the verdict of \$800 rendered by the jury in that case was arrived at in that way, and in no other." A verdict reached in the manner described is a chance verdict, ground for new trial, and the oath of the jurors or any one or more of them is competent, under the express provisions of section 4139 of the Revised Statutes, to impeach such verdict. But two of said jurors made a second and further affidavit in explanation of their first affidavit, and in explanation of the manner in which said verdict was reached, in which it is stated: "After the jury had voted two or three times, the sums voted ranging from the sum of \$300 to \$2,000, it was proposed that the jury should take a vote, each juror putting down the sum he thought the plaintiff was entitled to, then add all these sums altogether, and divide the aggregate sum by 12, the number of jurors; and this was done, as was then stated, in order to ascertain the average, which said average so obtained was the sum of \$875; after which some of the jurors thought the sum should be made \$900, and others that it should be made \$800, and after discussions it was then agreed to take another ballot, and that those who thought the sum should be \$800 should vote that amount, and those thinking that the sum should be \$900 to vote that amount.

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Upon this understanding, the last and final vote was taken, and the result was that the sum of \$800 had a majority of votes cast; and, after this was ascertained, it was then agreed by the jury unanimously to make the sum that should be returned by the jury \$800; and this is the way, in detail, in which the verdict of \$800 was arrived at." With this explanation of the manner in which the verdict was reached, said verdict could not very well be regarded as a chance verdict. Still, we think that the conduct of the jury in reaching said verdict is, at the least, of doubtful propriety. (See *Flood v. McClure*, 3 Idaho, 587, 32 Pac. 254.)

The appellant urges that the court erred on the trial in permitting the plaintiff John Giffen, while testifying as a witness, to make an explanation of a portion of his testimony. This was not error. The trial court should not permit a witness to act officiously, and voluntary statements from a witness, as a rule, should not be permitted over the objection of the party adversely interested. But it is only fair to the witness, as well as right to the parties, to permit a witness to make any explanation proper to prevent his evidence from being misunderstood, or correct any mistake that he may have made. The witness should, of course, not be permitted to wander outside of the issues, or to make any incompetent, immaterial, or irrelevant statements.

The verdict of the jury was in favor of the plaintiff, Mary Giffen, alone. This was erroneous. The court should have instructed the jury to have amended their verdict so as to find in favor of the plaintiffs, and both of them; and the judgment, whether the verdict was amended or not, should have been that the plaintiffs, John Giffen and Mary Giffen, recover, etc. The judgment is reversed and the cause remanded to the district court for further proceeding consistent with the views herein expressed. Costs of appeal awarded to the appellant.

Sullivan, C. J., and Huston, J., concur.

Points decided.

ON REHEARING.

(December 31, 1898.)

Per CURIAM.—We have examined the petition filed in this case. The questions raised by the petition for a modification of the decision were considered by the court and the authorities examined. We are not unmindful that our conclusions differ from those reached by the California court. Doubtless that court based its decision upon what it conceived to be the true intent and spirit of the statutes of California. We have done the same, taking the statutes of our state as our guide, and we see no reason for changing our views. Petition for modification denied.

(November 29, 1898.)**NAYLOR v. VERMONT LOAN AND TRUST COMPANY.**

[55 Pac. 297.]

PAYMENT OF SHERIFF'S FEES—SHERIFF MUST ACCOUNT FOR FEES EARNED.—Under the laws of Idaho, a sheriff may recover fees allowed by law for services rendered by him, although he failed to require payment of such fees in advance, but he must account to his county for all fees earned, whether collected by him or not.

PRACTICE—AMBIGUITY AND UNCERTAINTY IN COMPLAINT—REACHED BY SPECIAL DEMURRER.—Ambiguity and uncertainty in a complaint which states a cause of action, but not with that certainty contemplated by the code, cannot be reached by an objection to the introduction of evidence under the complaint, but only by special demurrer pointing out the ambiguity and uncertainty complained of by the defendant.

BILL OF EXCEPTIONS.—A bill of exceptions must state the evidence which was admitted by the court over the objections of the party excepting to the introduction of such evidence, with the grounds upon which the objection is made, or else such exception will not be considered by the court.

(Syllabus by the court.)

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APPEAL from District Court, Latah County.

A. E. Gallagher, for Appellant.

The contract on which plaintiff bases his action is void, as being contrary to the public policy of this state, which prohibits sheriffs from giving credit for fees and requires them to collect all fees in advance; that as the contract is void, it cannot be a basis on which to predicate this action. Section 2126 of the code, as amended in 1890 (Sess. Laws, p. 175), fixes the plaintiff's compensation. (Rev. Stats., secs. 2120, 2137.) The plaintiff is claiming through a contract of credit which is contrary to the public policy of this state, and for this reason void, and cannot be the basis of an action. His acts are to a certain extent the acts of the county and state. He performs the services as agent of the county. He is not the employee of the litigant, so that he cannot make any contract with the litigant concerning his compensation or the mode of collecting it. The court erred in not sustaining the defendant's objection to the introduction of any evidence under this complaint and in making findings in favor of defendant. (*Hawkeye Ins. Co. v. Brainard*, 72 Iowa, 130, 33 N. W. 603; *Clark on Contracts*, 419; *Griswald v. Waddington*, 16 Johns. 438; *Winchester Electric Light Co. v. Veal*, 145 Ind. 506, 41 N. E. 334, 44 N. E. 353; *Jackson v. Shawl*, 29 Cal. 268.) No contract founded on or growing out of an unlawful act can be enforced whether it be *malum in se* or *malum prohibitum*. (2 Pomeroy's Equity Jurisprudence, 1st ed., 935; *Vermont Loan etc. Co. v. Hoffman*, 5 Idaho, 376, 49 Pac. 314; *Robertson v. Robinson*, 65 Ala. 610, 39 Am. Rep. 17; *Bank v. Owens*, 2 Pet. 527, 539; *Snell v. Dwight*, 120 Mass. 9.)

E. C. Steele, for Respondent, cites no authorities on the points decided by the court not cited by attorney for appellant.

QUARLES, J.—This is an action brought by the plaintiff to recover fees for services rendered by him, as sheriff of Latah county, for the defendant. The findings of fact and judgment were in favor of the plaintiff. The contention of appellant, that public officers are prohibited by the laws of this state from performing official acts unless the fees allowed by law therefor are

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paid in advance, raises the first question for us to determine. This question is to be decided by the provisions of our constitution and statutes. By section 7, article 18 of the constitution, the compensation of sheriffs, exclusive of mileage, is fixed within certain prescribed limits, the maximum at \$4,000 and minimum at \$1,000 per annum. Section 8 of said article 18 is as follows: "The compensation provided in section seven (7) for the officers therein mentioned shall be paid by fees or commissions, or both, as prescribed by law. All fees and commissions, received by such officers in excess of the maximum compensation per annum provided for each in section seven (7) of this article, shall be paid to the county treasurer for the use and benefit of the county. In case the fees received in any one year by any one of such officers shall not amount to the minimum compensation per annum therein provided, he shall be paid by the county a sum sufficient to make his aggregate annual compensation equal to such minimum compensation." Section 2120 of the Revised Statutes of 1887, which provided for the payment of all compensation of county officers out of the county treasury, upon warrants, is repugnant, to some extent at least, to the above-quoted provision of our constitution. Sections 2137 and 2138 of the Revised Statutes, are as follows:

"Sec. 2137. The officers mentioned in this title are not in any case, except for the territory or county, to perform any official services unless upon the prepayment of the fees prescribed for such services except as in the succeeding section provided by law; and on such payment the officer must perform the services required. For every failure or refusal to perform official duty when the fees are tendered, the officer is liable on his official bond.

"Sec. 2138. No fee or compensation of any kind must be charged or received by any officer for duties performed or services rendered in proceedings upon *habeas corpus*."

Section 2140 of the Revised Statutes, is as follows: "If any clerk, sheriff, justice of the peace, or constable, shall not have received any fees which may be due him for services rendered in any suit or proceeding, he may have execution therefor, in his own name against the party from whom they are due, to be issued from the court in which the action is pending."

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The act of March 13, 1891 (Sess. Laws 1890-91, p. 175), fixes the fees that may be charged by county officers. But there is nothing in the act that amends or repeals either section 2137 or 2140 of the Revised Statutes, quoted *supra*. In determining the question before us we must have due regard for all of the foregoing statutory and constitutional provisions that are now in force. The conditions relative to the payment of compensation to county officers are somewhat changed by the above constitutional provisions from what they were prior to statehood. It is argued by the respondent that there is no longer any necessity for the payment into the county treasury of the fees earned by public officers; except as to the fees earned in excess of the maximum salary, and with this contention we agree. The expression "fees received," both in the constitution and in the act of March 13, 1891, cited *supra*, was intended to and does mean fees earned and which the officer is entitled to receive. Construing section 2137 and 2140 of the Revised Statutes, together so as to give force to both, we are compelled to hold that section 2137, *supra*, is not a prohibition against an officer from performing services unless they are prepaid in advance, but that the said section was passed for his benefit and gives him the absolute right to require prepayment of his fees. Any other construction would take all force and meaning from section 2140, *supra*, as it would be idle to say that an officer shall not perform any service without prepayment of his fees, and then provide for an execution for such fees as he may have earned and which have not been paid. A county officer may perform services without prepayment, and then maintain an action to recover the same. If such officer, in the fullness of his heart, sees fit to waive his right to prepayment of his fees, which he may do, there is no good reason why he should suffer for his leniency. The county is not injured, because he must account to it for all fees earned, whether he collects them or not; and, where his earnings exceed the maximum compensation allowed him by law, he must pay such excess into the county treasury in cash, whether he collects it or not. He should have collected and received all fees earned by him, and, so far as his liability to the county and the latter's

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rights are concerned, that which he should have done must be regarded as done. This rule works no hardship on the litigant who has failed, from inability, inconvenience, or other cause, to pay fees in advance to the officer performing services for him.

On the trial of this cause the defendant objected to the introduction of any evidence by plaintiff on the ground that "the complaint did not state facts sufficient to constitute a cause of action," which objection was overruled by the court, and an exception taken to such ruling by the defendant, and upon such ruling prejudicial error is assigned by the appellant. After setting forth the official capacity of plaintiff and the corporate existence of the defendant, the complaint alleges as follows: "That during the said year of 1894 the said defendant, Vermont Loan and Trust Company, commenced a large number of actions against divers defendants in the courts of Latah county, Idaho, and in Nez Perces county, Idaho, and called upon this plaintiff as such officer to perform certain services, according to the statutes of the state of Idaho, in said cases, and that said services consisted of serving of summons upon a large number of parties, and of copies of complaints, and of posting notices of sale of real estate, and of having publication made of the sale of such real estate in the proper newspapers, and of divers other legal duties, and that this plaintiff did perform all such services and expend money, as is provided by the statutes of the state of Idaho shall be done, in procuring publication of notices, to the amount of \$388.85; that said services were at the especial instance and request of the defendant, and were performed by this plaintiff as sheriff of the county of Latah, in the state of Idaho, and that this plaintiff has duly accounted to the said Latah county and said state of Idaho for the moneys which would properly go to the said county or state from each of the cases in which he so rendered services, and that there is now due this plaintiff the sum of \$388.85, together with interest thereon at the rate of ten per cent per annum from the first day of January, 1895, until the twelfth day of March, 1897, and from said twelfth day of March, 1897, until the present time, at the rate of seven per cent per annum, and plaintiff alleges that the payment of said money has been demanded, and that

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the defendant has failed, refused, and neglected to pay the same." To this complaint the defendant did not demur, but answered, admitting some of the allegations and denying others; and, for further and separate answer, alleged that defendant furnished its attorney in the suits in which the services were rendered by the plaintiff money to pay for such services; that the plaintiff agreed with such attorney to perform such services, and to look to said attorney personally for his compensation; and that the plaintiff had been paid such compensation in full by said attorney. The complaint, while deficient in conciseness and clearness, stated a cause of action. Any ambiguity or uncertainty therein could only be reached by special demurrer, alleging such ground and pointing out the defect specifically. It was good as against a general demurrer, and for that reason the objection to the introduction of evidence under it was properly overruled.

The cause was heard upon evidence introduced and upon a stipulation of facts. The trial court found in favor of the plaintiff, and against the defendant, upon all of the facts in issue. We have carefully examined the evidence in the record. The plaintiff offered evidence in support of his action, and also a stipulation of facts. The defendant introduced no evidence, but moved for a nonsuit, which was denied, whereupon the court found in favor of plaintiff upon all material issues. The evidence supports the findings, and there was no reversible error in overruling the motion for nonsuit or in making the said findings.

With a view to the record before us, and other records that have recently been before us, we deem it best to call the attention of the bar to the necessity of making briefs, bills of exceptions, and other parts of records upon appeal with more conciseness than many of them are made. We know that it requires much less labor to make a long brief than it does to make a short concise one, which covers the points in issue, with necessary citation of authority. But the short, concise brief, which cites only those authorities which are in point, is of much more assistance to the court than the long brief, with copious quotations and numerous citations of authority, some applicable

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and some inapplicable to the case at bar. It requires "time, labor and thought" to select those authorities only applicable to the case briefed. We spend much time in looking up and reading authorities that are cited to us which have no bearing upon the case under consideration. There is a growing tendency to make long briefs. The object of the attorney in such case is generally a good one—that is, to assist the court—but the intention miscarries. Not only that, but those unnecessarily long records and briefs work hardships upon litigants. It costs money to print them. In the case at bar the counsel on both sides signed a stipulation of facts, and we herewith give as a specimen of conciseness and clearness, one sentence, in the following words, to wit: "It is hereby stipulated and agreed by and between the plaintiff, through his attorney, E. C. Steele, and the defendant, through its attorney, A. E. Gallagher, that all the matters and things hereinafter stated shall be taken and deemed as facts established upon the trial of this cause, and that either party hereto upon the trial of this cause may read any or all parts of this stipulation in evidence, and that the same shall thereupon be taken and deemed as the facts established in this case without further testimony to establish the same; but it is understood and agreed that when either party offers to read in evidence part or all of the facts hereinafter set forth, that either party shall then have the right to object to the same being read in evidence upon any ground upon which an objection to the offering of the proof or the proof itself by any witness or other best evidence to establish the fact, were such witness or evidence present in court; it being understood, however, that this right of objection to the offering or receiving of any of the facts hereinafter stated in evidence shall not extend to the form, order or manner of making such proof, or to the fact that the evidence of such fact as hereinafter stated is in narrative form instead of questions and answers, but the party objecting shall at the time of making such objection designate by line and page of this stipulation that part of the facts hereinafter stated to which objection is made, and the same shall be received or rejected subject to the ruling of the court, and an exception may be taken to the receiving or rejection of such

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evidence, the same as if the witness was present in court and offered to prove the facts." The said stipulation covers sixteen pages of the printed transcript in this case. The facts agreed upon in it should have been stated in two pages or less. The exceptions which appear in the record touching the introduction of evidence appear on the face of the record to have been made up after the transcript was printed. We quote from the transcript, commencing near bottom of page 19, two of the exceptions, as specimens, to wit: "The defendant further objected to all that part of the stipulation, Plaintiff's Exhibit 'A,' beginning with the word 'in,' on line 17 at page 41 of the stipulation, down to and including the figures '\$2,35,' on line 20 of page 42 of the stipulation, for the reasons that the same was incompetent, irrelevant and immaterial, and not proper to support any of the issues made by the pleadings. The court overruled the objection, and thereupon the defendant duly excepted, which exception was allowed by the court, and this ruling of the court is assigned as error, and will be relied upon by the defendant on its motion for a new trial as one of the errors committed by the court in the trial of this cause." Then the defendant further objected "to all that part of the stipulation beginning with the word 'that,' on line 20 of page 42, down to and including the word 'upon,' on line 1 of page 43, thereof, for the same reasons. The court overruled the objection, and thereupon the defendant duly excepted, which exception was allowed by the court, and this ruling of the court is assigned as error, and will be relied upon by the defendant on its motion for a new trial as one of the errors committed by the court in the trial of this cause." The numerals showing the line and page on which the evidence objected to commences and ends was interjected into the printed transcript before us after it was printed with pen and ink. There are twenty exceptions found in the printed transcript (covering eight printed pages), and in what is termed "A statement of case and bill of exceptions on motion for new trial," each in the same condition and form as those quoted above. Presumably the numerals referring to lines and pages in the original bill of exceptions referred to lines and pages in the original stipulation. Assuming this as true, it would

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seem that, in making up the transcript on appeal, parts of the original bill of exceptions—that is, the figures referring to the lines and pages of the original stipulation where the portions of such stipulation objected to commence and end—were omitted, and part of the bill of exceptions was printed in skeleton form. If this assumption is correct, the figures in the original bill of exceptions referred to are different from those in the record before us. Such practice cannot be tolerated. The bill of exceptions as drafted did not conform to the practice in vogue in this state or to the rules of this court. That part of the evidence offered by the plaintiff admitted by the court over the defendant's objections, and excepted to, should have been set forth in the bill of exceptions, and not by way of numerous references. In order to ascertain those parts of the stipulation to which the exceptions relate, the court would be compelled to turn from one part of the record to the other parts at least forty times. This court will pay no attention to exceptions which come before it in this form. The judgment appealed from is affirmed, with costs of appeal to respondent.

Sullivan, C. J., and Huston, J., concur.

(November 30, 1898.)

BARNES v. PITTS AGRICULTURAL WORKS.

[55 Pac. 237.]

HARMLESS ERROR.—A judgment will not be reversed for harmless error.

PRACTICE—SECTION 3364 OF THE REVISED STATUTES CONSTRUED.—

Under the provisions of section 3364 of the Revised Statutes a cause of action does not accrue until the mortgage debt is paid in full and a discharge of the mortgage demanded.

PLEADING—REFUSAL TO ESTABLISH DEFENSE BY PROOF.—Where the demurrer to an answer is sustained and a new answer is filed setting up the same defense, to which no objection is made, and the party making such answer withdraws from the case and refuses to establish his defense by proof, the error committed in sustaining the demurrer not prejudicial.

(Syllabus by the court.)

Argument for Respondent.

APPEAL from District Court, Latah County.

George W. Goode, for Appellant.

Revised Statutes of Idaho, section 3364, entitles a mortgagor, etc., to bring an action for the penalty whenever the mortgage has been satisfied, and the mortgagee refuses to cancel the same of record on demand. (*Wilber v. Pierce*, 56 Mich. 169, 22 N. W. 316.) The word "satisfied" in the statute, we submit, means "in so far as the mortgage is legal and binding." (*Stevens v. Home Sav. etc. Assn.*, 5 Idaho, 739, 51 Pac. 779, 986.) When an appeal is perfected from such an order or judgment as the one appealed from, all proceedings in the cause are stayed until the determination of such appeal. (Idaho Rev. Stats., sec. 4814; *Ruggles v. Superior Court*, 103 Cal. 125, 37 Pac. 211; *Livermore v. Campbell*, 52 Cal. 75; *Chouteau v. Prowse*, 90 Mo. 191, 2 S. W. 290; *Petrie v. Muskegan Co. Judge*, 98 Mich. 130, 56 N. W. 1109; *Woodrum v. Kirkpatrick*, 2 Swan (Tenn.), 218; 2 Ency. of Pl. & Pr., 327 et seq.; *Kaufman v. Superior Court*, 108 Cal. 446, 41 Pac. 476.)

Stewart S. Denning, for Respondent.

Where the plaintiff, in making the opening statement of the case to the court and jury, admits a state of facts the existence of which precludes a recovery by him, the court may close the trial at once. (*Oscanyan v. Arms Co.*, 103 U. S. 261; *Lindley v. Atchison etc. R. R. Co.*, 47 Kan. 432, 28 Pac. 201; *Missouri Pac. Ry. Co. v. Hartman*, 5 Kan. App. 581, 49 Pac. 109; *Noble v. Frack*, 5 Kan. App. 786, 48 Pac. 1004; *Marks v. Northern Pac. Ry. Co.*, 76 Fed. 491.) The court will not impose the statutory penalty for refusal to release or satisfy a mortgage of record where the mortgagee has been honestly mistaken as to his rights or the amount due. (Jones on Mortgages, 4th ed., sec. 991; Boone on Mortgages, sec. 158; *Barrows v. Bangs*, 34 Mich. 304; *Myer v. Hart*, 40 Mich. 517, 29 Am. Rep. 553; *Canfield v. Conklin*, 41 Mich. 371, 2 N. W. 191; *Parks v. Parker*, 57 Mich. 57, 23 N. W. 458; *Parks v. Allen*, 42 Mich. 482, 4 N. W. 227.) Where the complaint alleges payment, setoff or counterclaim cannot be proven. (Idaho Rev. Stats., sec.

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4227; *Ulsch v. Muller*, 143 Mass. 379, 9 N. E. 736; *Grinell v. Spink*, 128 Mass. 25; *Wheaton v. Nealson*, 11 Gray, 15; *Wagner v. Sullivan*, 20 S. C. 533; *Sullivan v. Sullivan*, 20 S. C. 509; *Blunt v. Williams*, 27 Ark. 574; 22 Am. & Eng. Ency. of Law, 216, and notes.) Appellant's complaint does not state facts sufficient to constitute a cause of action, inasmuch as it fails to allege that respondent at any time refused to execute, acknowledge or deliver to him a certificate of the discharge of the chattel mortgage on demand of appellant. (Idaho Rev. Stats., sec. 3364.) The possession of the property in controversy by respondent was rightful as disclosed by the record in the case, and therefore no damages could arise for any wrongful taking or conversion. (Boone on Mortgages, sec. 256, and notes.)

This action was brought under the provisions of section 3364 of the Revised Statutes, to recover \$100 penalty and \$300 damages for defendant's refusal to discharge a mortgage alleged to have been fully satisfied. The answer put in issue the material allegations of the complaint; and at the same time the defendant, who is respondent here, filed a cross-complaint setting out certain promissory notes, and averring that the same were secured by the mortgage referred to in the complaint, and that there was due on said promissory notes the sum of \$401.24, and demanded judgment and decree foreclosing said mortgage, and for an attorney's fee of forty dollars. The plaintiff, by answer to said cross-complaint, admits certain allegations thereof, and denies others, and, as a separate defense, avers that the defendant wrongfully and unlawfully took possession of the property described in said mortgage, and held possession thereof for seventeen and one-half days; that the same was worth twenty dollars per day, making a total of \$350; that on November 20, 1897, the defendant converted to its own use certain personal property belonging to the plaintiff of the value of \$260; and that plaintiff elected to waive the wrong and damages, and to apply the value of said property in payment of the promissory notes. Upon the issues thus joined a jury was impaneled to try the case. Thereupon counsel for plaintiff stated his case to the jury, which statement clearly showed that only a part of the indebtedness secured by said mortgage had been paid.

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At the close of this statement counsel for the defendant moved the court to dismiss and take from the jury the cause of action stated in the complaint, on the ground that the opening statement of plaintiff's counsel to "the jury and plaintiff's answer to the cross-complaint, taken together, clearly showed that no payment had ever been made to the defendant such as would warrant the plaintiff to sue for the statutory penalty for failure to cancel or satisfy the said mortgage," which motion was sustained by the court. Counsel for appellant then objected to any further proceedings until such time as "the appeal now on file had been determined by the supreme court," which objection was overruled by the court. A demurrer to the answer of the cross-complaint was then argued, submitted to, and sustained by the court; whereupon counsel for appellant renewed his objection to further proceedings in the case, on the ground that an appeal had been perfected from the ruling of the court dismissing the cause of action stated in the complaint. The objection was overruled by the court. Counsel for respondent then moved to discharge the jury, on the ground that, as the case then stood, it was a straight foreclosure action, and not a proper case for a jury, which motion was granted. It appears from the record that the foregoing proceedings occurred on the second day of June, 1898. On the following day the jury was discharged from the further consideration of the case. It also appears that the plaintiff filed his amended answer to said cross-complaint on the third day of June, 1898, and thereafter withdrew all further appearance, and refused to proceed with the trial. No demurrer was interposed to said amended answer. The plaintiff abandoned the case, and refused to introduce any evidence in support of his amended answer. The court then proceeded with the trial of the cause of action set up in defendant's cross-complaint, and rendered judgment and entered a decree of foreclosure in favor of the defendant as prayed for in its cross-complaint. The appeal is from the order and judgment dismissing plaintiff's complaint, and from the judgment and decree of foreclosure made in favor of the defendant on its cross-complaint.

SULLIVAN, C. J. (After Stating the Facts.)—The first error assigned is that the court erred in sustaining the defendant's objection to plaintiff's counsel reading section 3364 of the Revised Statutes to the jury, as reference was made thereto in the complaint. It appears that plaintiff's counsel, in making his opening statement to the jury, undertook to read said section of the statute to the jury, and objection was made thereto by defendant's counsel, and the objection was sustained. As plaintiff's action was brought under the provisions of said section, and said section referred to in the complaint, we think it was error to refuse to permit counsel to read the same to the jury. But the error was harmless, as the case made by plaintiff's complaint was afterward dismissed and the jury discharged. A judgment will not be reversed for harmless error. This court recognizes the general rule that the jury gets the law from the court. But where, as in this case, the action is brought under a section of the statute which is referred to in the complaint, counsel may read to the jury, so as to give them an intelligent understanding of the section of the statute.

The dismissal of plaintiff's original action is assigned as error. Under the provisions of section 3364 of the Revised Statutes no cause of action accrues until a mortgage debt has been fully paid, and demand for discharge thereof made, and, as plaintiff's answer to defendant's cross-complaint clearly shows that said debt had not been paid at the date the suit was brought, the motion to dismiss the plaintiff's action was properly sustained.

It is contended that the court proceeded with the trial after plaintiff had perfected his appeal from the order and judgment of the court dismissing his complaint. There is nothing in the record to sustain this assignment of error. No appeal had been perfected until nineteen days after the trial of said cause. Why counsel for appellant should make this contention, under the facts shown in the record, is beyond our conception, as no appeal had been taken, as claimed in said motion.

Sustaining defendant's demurrer to plaintiff's cross-complaint is assigned as error. The plaintiff brought his action to compel the discharge of a mortgage that he alleged had been fully paid, and for the penalty and damages provided for by sec-

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tion 3364 of the Revised Statutes. The defendant answered by denying the payment of said mortgage debt in full, and by cross-complaint prayed for the foreclosure of its mortgage for the balance due on said promissory notes. The plaintiff answered the cross-complaint by denying that there was anything due to the mortgage, and averring that it had been paid in full; and, as a separate defense, admits that said mortgage debt had not been paid in full, and sets up a counterclaim, on which he avers there is due him about \$700, and that he applies said sum in payment of said balance due on the mortgage debt. By his answer he admits that he has no cause of action on his complaint, and the court did not err in dismissing it. The demurrer to the answer was then sustained, and the plaintiff thereupon filed an amended answer, setting up substantially the same defense as contained in the answer, to which no demurrer was interposed. He thereafter withdrew from any further participation in the trial of the case. We conclude, after a very careful examination of the record, that, if the court erred in sustaining said demurrer, the error was harmless, for the reason that, under the amended answer, the defendant was permitted to make the same defense as under the answer which was stricken out on demurrer. For that reason no prejudicial error was made against him. The judgment of the lower court is affirmed, and costs of this appeal are awarded to the respondent.

Huston and Quarles, JJ., concur.

ON REHEARING.

(December 10, 1898.)

Per CURIAM.—The petition for a rehearing in this case presents nothing new. Counsel seem to think the court has overlooked something in the record. We do not find it so. The record was made up with little or no regard to the rules of the court prescribing the manner in which such documents must be prepared. We think we were very lenient—too much so, perhaps—in considering the case upon such a record, but, having done so, we have, with much labor, arrived at what we regard a correct conclusion. The record shows that “the amended an-

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swer to cross-complaint" was filed June 3, 1898, and the "demurrer to amended answer to cross-complaint" was filed on same day. Following these statements in the record, under the heading, "Afternoon Session, June 2, 1898," the court passed upon a motion by defendant's counsel to take the case from the consideration of the jury, and granted the same. Counsel for appellant then objected to any further proceedings in the cause, on the ground that an appeal had been perfected from the ruling of the court dismissing plaintiff's complaint therein. This objection of plaintiff's counsel was overruled by the court. The court having dismissed the jury, counsel for plaintiff (appellant) made the following statement, as appears by the bill of exceptions in the record: "Mr. Goode: Now, at this time, the plaintiff, Thomas Barnes, withdraws all further appearance, and refuses to proceed with the trial of this cause, in the manner and form as indicated by the court." Thus, it appears from the record that on June 2d counsel for the plaintiff (appellant) retired from the case, refusing to proceed further with the trial, and yet the record shows that on the 3d of June he filed an "amended answer to the cross-complaint." Counsel for appellant stated to the trial court that he had perfected an appeal from the order of the court dismissing the complaint of plaintiff. That could not refer to the appeal before us, as the notice of appeal herein was not filed until the 22d of June, 1898. The cause was submitted in this court without argument by appellant, and perhaps what we should have done was to examine the record before accepting such submission; but, not having done so, we have made the best we could of it, and we believe have reached a just and legal conclusion. If counsel for appellant thinks his case has not been fairly presented, he has no one to blame but himself. He prepared the transcript (if such it can be called) himself. He declined to argue his case orally. The transcript is a mass of inconsistency and irrelevancy. Confident that a rehearing would shed no new light upon the case, and that we have done justice under the law, we decline to listen to another presentation of the case. Rehearing denied.

Argument for Respondents.

(November 30, 1898.)

ELLIOTT v. COLLINS.

[55 Pac. 301.]

PRACTICE—DISMISSAL OF ACTION.—Under subdivision 1 of section 435, Revised Statutes, the plaintiff may dismiss at any time before a counterclaim has been made or affirmative relief sought by cross-complaint or answer of defendant.

PLEADINGS.—Under the provisions of subdivision 2, section 4168, in actions *ex contractu* or *ex delicto* the pleader is required to make in his complaint a statement of the facts constituting the cause of action in ordinary and concise language.

ELECTION OF REMEDIES.—In order to apply the doctrine of election of remedies the party must actually have at his command inconsistent remedies.

(Syllabus by the court.)

APPEAL from District Court, Nez Perces County.

James W. Reid, for Appellant.

As the witnesses were material and necessary, and the trial set and commenced, and no dispute of these facts, the court erred in refusing to allow their fees. (*Griffith v. Montandon*, 4 Idaho, 75, 35 Pac. 704.)

Eugene O'Neill, for Respondents.

The claim that is resisted here is for witness fees for witnesses that never were sworn. And their attendance and presence was not material or necessary, and their fees were not necessary costs or disbursements to defendant, the case going off on a motion by defendant that could have been presented on April 10th, or any time between April 7th and April 10th before case was set. (*Griffith v. Montandon*, 4 Idaho, 75, 35 Pac. 705; Rev. Stats., sec. 4912.) Mr. Harrington was the first witness called by the plaintiffs. He originally lost logs sued for in this case. The court, too, would recognize that Harrington was plaintiffs' first witness and case went off on motion. (*Fanning v. Leviston*, 93 Cal. 186, 28 Pac. 943.) Affidavit does not show that witnesses were actually in attendance,

Statement of Facts.

nor wherein their attendance was necessary in this. (Idaho Rev. Stats., sec. 6139.)

This action was brought in the probate court of Nez Perces county, to recover the value of two hundred and four sawlogs alleged to have been wrongfully taken from Snake river by Collins, the respondent. Judgment in that court went in favor of the plaintiffs, when an appeal was taken to the district court by the defendant. When the cause was reached for trial in the district court, and a jury impaneled for the trial of the case, and a witness sworn on behalf of the plaintiff had answered a preliminary question, counsel for defendant objected to a certain question then put to the witness, on the ground of irrelevancy and incompetency, and on the ground that the plaintiff had already brought an action *ex contractu* for "a recovery on the same cause of action set out in this action, which is an action *ex delicto* or in trover and conversion," and for that reason the court had no jurisdiction to hear any further evidence for or on behalf of the plaintiff; that the plaintiff, having elected to proceed *ex contractu*, waived the wrong, and was barred from any other remedy—which motion was sustained, and the cause of action dismissed. The record shows that the plaintiff brought an action against the defendant in the probate court of Nez Perces county to recover \$200, alleged to be due for certain logs sold and delivered to the defendant by plaintiff and one Harrington. That suit was brought on the twentieth day of January, 1897. A demurrer was interposed and argued and submitted to the court on the twenty-ninth day of December, 1897; and, before the court announced its decision on the demurrer, the plaintiff moved to have the suit dismissed, without prejudice to a new action, which motion was granted, and the action dismissed. Thereupon this suit was commenced. In substance, it is alleged in the complaint as a first cause of action that one Jason M. Harrington owned certain sawlogs, and, while such logs were passing down Snake river, the defendant took possession of the same, and converted them to his own use, contrary to the form of the statute, and said Harrington's damage in the sum of \$275; that demand was made for the same, which was refused; that said claim was duly assigned to plaintiff prior to the com-

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mencement of the suit—and prays for judgment for \$275. For a second cause of action, it is alleged that, while certain saw-logs of the plaintiff were passing down Snake river, the defendant forcibly took possession of and carried away sixty-eight logs, of the value of \$136, and converted them to his own use; that demand has been made on the defendant for the return of said logs, or the payment of their value, which was refused by the defendant.

SULLIVAN, C. J. (After Stating the Facts.)—The question for decision is, Did the court err in entering judgment of dismissal? The respondent contends that in the first action the plaintiff elected to sue in *assumpsit*, and that he could not dismiss that action, and thereafter sue in tort. The trial court sustained this contention, and dismissed the suit. The first suit was dismissed by the court without prejudice to another action on the motion of plaintiff. In that action the defendant had not answered. That being so, the plaintiff had a right to dismiss his suit at the time he did, under the provisions of subdivision 1 of section 4354 of the Revised Statutes.

It appears from the record that the plaintiffs had but one remedy, and that was for the value of the logs. Subdivision 2, section 4168, requires the complaint to contain a statement of the facts constituting a cause of action in ordinary and concise language; and that is what was done in the complaint in this cause of action. In order to apply the doctrine of election of remedies, the party must actually have at command two inconsistent remedies. He must not only think he has them, but must in fact have them. (7 Am. & Eng. Ency. of Law, 364.) The judgment of the court below is reversed, and the cause remanded for further proceedings not inconsistent with this opinion. Costs of the appeal are awarded to the appellants.

Huston and Quarles, JJ., concur.

Argument for Respondents.

(December 1, 1898.)

CORNWELL v. URTON.

[55 Pac. 294.]

EVIDENCE—USURY.—Evidence examined and found not to support the finding of the court that the notes and mortgage sued on were in violation of the usury laws of Idaho. (See *Cornwell v. McCoy*, ante, p. 219, 55 Pac. 240, and *Cornwell v. Carter*, ante, p. 222, 55 Pac. 240, decided at this term.)

(Syllabus by the court.)

APPEAL from District Court, Nez Perces County.

James E. Babb, for Appellant.

Usury must be pleaded and must be established by evidence beyond a reasonable doubt. (1 Jones on Mortgages, 5th ed., sec. 643; *Jefferson v. Burhans*, 85 Fed. 949.) Payment by the borrower of commission for services in procuring the loan rendered by a third person acting *bona fide* as the agent or broker for the borrower, and of which commission the lender receives no part, directly or indirectly, can never render the loan usurious, for the plain reason that the lender is no party to the transaction. The fact that the lender is cognizant of the agreement between the borrower and his own agent does not affect the rule so long as the commissions are solely for the latter's benefit. (27 Am. & Eng. Ency. of Law, 1003, and cases cited; *Mackey v. Winkler*, 35 Minn. 513, 29 N. W. 377; *Acheson v. Chase*, 28 Minn. 211, 9 N. W. 734; *Nichols v. Osborn*, 41 N. J. Eq. 92, 3 Atl. 155; *Marck v. American etc Mtg. Co.*, 79 Ga. 213, 7 S. E. 266; *Thomas v. Miller*, 39 Minn. 339, 40 N. W. 358; *Secor v. Patterson*, 114 Mich. 37, 72 N. W. 9.)

James W. Reid, for Respondents.

In this action it is apparent from reading the complaint and answer that the five notes sued on which are respectively one note for thirty-four dollars and four notes for thirty-six dollars each, were given to Harry Cornwell the plaintiff and appellant, as interest, for a loan of money advanced by James H. Tallmon to the respondents in the sum of \$1,200. The court having

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heard the testimony and found this fact, there was no error in entering up the judgment given. We submit that judgment should be affirmed. (*Vermont Loan etc. Co. v. Hoffman*, 5 Idaho, 376, 49 Pac. 314; Idaho Rev. Stats., sec. 1266.)

HUSTON, J.—The facts in this case are almost identical with the facts in the cases of *Cornwell v. McCoy*, ante, p. 219, 55 Pac. 240, and *Cornwell v. Carter*, ante, p. 222, 55 Pac. 1100, decided at the present term of this court. The plaintiff was applied to by the defendants, through a firm of attorneys, to procure for them a loan of \$1,200, for a period of five years, at ten per cent per annum. This application was in writing, and made plaintiff the agent of defendants for the procurement of said loan, and the defendants agreed, by a written instrument signed by the principal defendant, to pay to the plaintiff a certain amount as commissions for procuring said loan, and to secure the payment of such commissions by note and mortgage. The loan was procured by plaintiff, and security given therefor by defendant of one James H. Tallmon, and on the same date defendants executed to plaintiff the notes and mortgage sued on in this action in accordance with defendant Allen Urton's contract theretofore made with plaintiff. Defendants claim, and attempt to prove, that the notes and mortgage given to the plaintiff by them were given to secure interest on the loan made by Tallmon to defendants, but the failure to establish such fact is absolute. As illustrative of the kind of evidence upon which the court based its finding that the mortgage sued on was given for interest on the loan from Tallmon to defendants, we copy from the transcript a portion of the examination of Allen Urton, the principal defendant: "Q. What was the consideration, if you know, of this mortgage [being the mortgage sued on]? A. Is this the Cornwell mortgage? Q. This is the Cornwell mortgage. The Court: The one sued on in this action? A. Well, \$178, I think. Q. What was the consideration—what was it for? What did you give the note for? A. It was for three per cent of the interest. Q. Interest on what? A. Three per cent. Q. Interest on what? A. I do not mean 'interest'; it is the interest on the note—on those notes in that mortgage? Q. What mortgage? A. On the Cornwell mort-

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gage. Q. Well, the Cornwell mortgage, Mr. Urton, is what I am asking about. Listen to me. This mortgage that has been introduced in evidence is for \$178, payable to Cornwell. You say it was for interest. Interest on what? No answer. Q. Now, answer it. What was this interest on? A. I do not understand it." At this point the court, with the laudable intent, unquestionably, of throwing some light on the matter under investigation, interposed as follows: "The Court: Well, I will explain it to you. It is \$178, you say? A. Yes, sir. The Court: Now, interest on what? What is the interest for? What is that mortgage for? That is what he wants to know. A. How much interest? The Court: Yes; interest on what? No answer." His honor's interference having simply served to make "confusion worse confounded," counsel for defendant again returns to the conflict with the by this time somewhat threadbare interrogation: "Q. What was that interest on, Mr. Urton? A. It was on the mortgage." The court, having undiminished confidence in its ability to enlighten the clouded perception of the witness, again propounds: "The Court: What did that grow out of? Interest on what? There is \$178, you say, for interest. Interest on what? A. On Mr. Cornwell's notes; these five [referring to the notes here sued on]. Q. What were these five notes given to Mr. Cornwell for? You say they were given for interest. Interest on what?" The court, seeing that any further present effort to get an intelligible answer from the witness was useless, makes the following suggestion: "The Court: I think the witness had better go and think about these things awhile." With the conclusion of the court we are in full accord. Thereafter the following question was put to the witness by his counsel: "Q. You say here, Mr. Urton, that you gave Mr. Cornwell a note here. You signed this mortgage, and gave him these notes for \$178, and you say that was interest on something. What was it interest on? A. It was interest on the \$1,200 note—the Tallmon note." This witness had already testified that the notes were given for the interest on the Cornwell notes—the notes sued on. It is due to counsel for appellant that all of this evidence was taken under objection. Upon his cross-examination the same witness testi-

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fied: "Well, I could not say whether this mortgage given to Mr. Cornwell was given to him for his commission or not. No; I do not know, sir. It was a commission mortgage. . . . I do not know whether it was given to Mr. Cornwell to secure money due for him for commission; I could not say. The Court: Can you say it was not, is the question, given for commission? A. Well, I presume it was given for that. I do not know whether it was or not. I could not state positively." Much more testimony of the same kind was given by this witness, equally uncertain, unsatisfactory, and inconclusive; and this, in the face of a written contract signed by said defendant Allen Urton, wherein he appoints the plaintiff his agent to procure for him a loan of \$1,200, and agrees to pay him a commission for his services in negotiating such loan equal to the difference between ten per cent and the rate of interest at which he may procure said loan. The defendants do not attempt to deny the contract made with plaintiff to procure the loan; nor do they intimate that he received any other compensation from the defendants or anyone else. Neither is there any evidence whatever that plaintiff was acting for or on behalf of the party making the loan, or that said party had or received, directly or indirectly, any part of the compensation going to the plaintiff. We find no evidence in the record supporting the finding of the court that the notes and mortgage sued on in this action "were for interest, and in violation of the usury law of Idaho." The judgment is reversed, and the cause remanded to the district court, with instructions to enter judgment for plaintiff in accordance with the prayer of complaint.

Sullivan, C. J., and Quarles, J., concur.

Argument for Appellant.

(December 3, 1898.)

BRADY v. YOST.

[55 Pac. 542.]

PUBLIC INTEREST—CONTRACT.—B. entered into a contract with Y. for the purchase of the material and fixtures constituting the newspaper publishing plant of the "Silver Blade" newspaper, and as a part of the consideration agreed to obtain for Y. the contract to publish certain classification lists of mineral lands. And Y. on his part agreed to bid for the county printing of Kootenai county, and in case he was awarded said printing, he would assign the contract to B., provided B. complied with his part of said contract and purchased said newspaper plant. B. performed all the conditions of said contract agreed to be performed by him, and Y. thereupon refused to turn over said property to B., on the ground that said contract was contrary to public interest or policy, illegal and void. *Held*, under the facts of this case said contract was legal, valid and not in conflict with public interest.

ILLEGAL CONTRACT.—Any agreement respecting public contracts to be awarded on bids which tends to deprive the people of the advantage of competition in bidding is unlawful and void.

SPECIFIC PERFORMANCE.—A court of equity will decree a specific performance of a contract for the sale of chattels when damages at law will not afford a complete and adequate remedy.

SPECIAL FINDINGS BY JURY.—In equity suits the specific findings of a jury are advisory only. The court may disregard such findings when they are clearly against the evidence. Section 4396, Revised Statutes, recognizes a distinction between law and equity.
(Syllabus by the court.)

APPEAL from District Court, Kootenai County.

Charles L. Heitman, for Appellant.

Where one copy of a contract which is to be executed in duplicate has been signed by the parties, but is left with the attorney of one party to have a duplicate executed, there is not a sufficient delivery of the instrument to constitute a contract. (*Lamar Milling etc. Co. v. Craddock*, 5 Colo. App. 203, 37 Pac. 950.) Every new contract seeking to carry out or enforce any of the unexecuted provisions of a former illegal contract is void. (*Gray v. Hook*, 4 N. Y. 450; 3 Am. & Eng. Ency. of Law, 887; Idaho, Vol. 6—18

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Comstock v. Draper, 1 Mich. 481, 53 Am. Dec. 78; *Moffatt v. Bulson*, 96 Cal. 106, 31 Am. St. Rep. 192, 30 Pac. 1022.) It is well settled that any agreement to attempt, for a compensation, to influence a public officer in the performance of a duty, or the execution of a power, is contrary to public policy, and therefore, illegal and void. (*Tool Co. v. Norris*, 2 Wall. 45; *Oscanyon v. Arms Co.*, 103 U. S. 261; 3 Am. & Eng. Ency. of Law, 877; 9 Am. & Eng. Ency. of Law, 908, 915; *Clippinger v. Hepbaugh*, 5 Watts & S. 315, 40 Am. Dec. 519; *O'Hara v. Carpenter*, 23 Mich. 410, 9 Am. Rep. 89; *Brooks v. Cooper*, 50 N. J. Eq. 761, 35 Am. St. Rep. 793, 26 Atl. 978.) An agreement whose object is to induce any officer of the state to act partially or corruptly is void. (3 Am. & Eng. Ency. of Law, 877.) An agreement which has a tendency that way is void. (*O'Hara v. Carpenter*, 23 Mich. 410, 9 Am. Rep. 89.) It is well settled that any agreement, respecting government contracts to be awarded to the lowest bidder, which tends to deprive the government of the advantage of competition in the bidding is unlawful and void. (*Swan v. Chorpeming*, 20 Cal. 182; *Brooks v. Cooper*, 50 N. J. Eq. 761, 35 Am. St. Rep. 793, 26 Atl. 978; *Hunter v. Pfeiffer*, 108 Ind. 197, 9 N. E. 124; *Boyle v. Adams*, 50 Minn. 255, 52 N. W. 860; *Brisbane v. Adams*, 3 N. Y. 129.) The correct manner of presenting issues of fact in cases of chancery to the jury is now well established to be by interrogatories and the interrogatories should cover all material questions in dispute. (*Kelly v. Perrault*, 5 Idaho, 221, 48 Pac. 45.)

W. W. Woods, for Respondent.

Appellant claims that equity will not decree specific performance of a contract relating to chattels, citing 3 Pomeroy's Equity Jurisprudence and other authorities. This is true as a general proposition, but the exceptions are provided for so plainly as to leave no doubt as to the class of cases in which specific performance will be decreed as a matter of course by a court of equity. (Pomeroy's Equity Jurisprudence, sec. 1404; *Treasurer v. Com. M. Co.*, 23 Cal. 391; 2 Kent's Commentaries, 9th ed., 661; 2 Story's Equity Jurisprudence, sec. 717; *Senter*

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v. Davis, 38 Cal. 450.) The contract in the present case, as well as the means by which it was executed, were in no sense illegal or in conflict with public interest. (*Stanton v. Embry*, 93 U. S. 543; *Salinas v. Stedman*, 66 Fed. 677; *Twist v. Child*, 21 Wall. 441; *Cheeseborough v. Conover*, 140 N. Y. 382, 35 N. E. 633.) This action is equitable for specific performance of contract relative to chattels. Section 4369 of the Revised Statutes of Idaho does not change the rule in equity that in such an action the findings of a jury are advisory to the court. In this class of actions the findings of the jury being advisory, the court, sitting as chancellor adopts, rejects, modifies, ignores or makes new findings. The fact that this suit was tried with an advisory jury would imply, in the strongest terms, that a general verdict was waived. Unless the contention urged by appellant in this court upon this point had been made in the court below it could not be presented to or considered by this court. There is nothing in the record by bill of exceptions or otherwise to indicate that this matter was ever presented to the trial court. (*Darby v. Heagerty*, 2 Idaho, 282, 13 Pac. 85; *Heilner v. Brown*, 2 Idaho, 263, 12 Pac. 903.)

SULLIVAN, C. J.—This is a suit in equity, wherein the respondent, who was the plaintiff in the court below, seeks to compel the specific performance of a contract of sale for the newspaper plant known as the "Silver Blade," which is situated at Rathdrum, Kootenai county. The complaint contains the necessary allegations, and pleads the contract *in haec verba*. The contract is as follows:

"Made this tenth day of February, 1897, between John F. Yost, of Rathdrum, Kootenai county, Idaho, party of the first part, and J. C. Brady, of Rathdrum, Kootenai county, Idaho, party of the second part, witnesseth: That the said party of the first part, in consideration of one dollar cash in hand to him paid by the second party, and of the covenants hereinafter mentioned, hereby agrees to grant, bargain, sell, and convey to said party the following described property, to wit: All the material and fixtures appertaining to the office of the 'Rathdrum Silver Blade,' and used in the publication and printing of said news-

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paper, which said material is located in Rathdrum, Kootenai county, Idaho, and is the property of said first party according to an inventory of said property given by said first party to said second party, with inventory hereto attached, and marked 'A.' The terms of said sale shall be as follows: \$700 payable on or before the delivery of possession by first party to said second party of the property mentioned herein, and \$500 payable within one year hereafter, which said payment of \$500 shall be secured by a promissory note and chattel mortgage of said property, said promissory note to bear interest at the rate of ten per cent per annum. The said second party agrees to secure to the said first party publication of certain legal notices, and in consideration thereof it is hereby agreed that seventy per cent of the amount received by said first party for such publications shall be considered as so much money paid in pursuance of this contract, and applied as a part of the aforesaid \$700. The said first party further agrees that he will make a reasonable bid for the county printing for Kootenai county, Idaho, to be let by the county commissioners thereof in April, 1897, and, in the event he is awarded the contract therefor, that in compliance with this contract by the said second party in the payment of the said \$700 as aforesaid he will assign the said contract to the said second party, if upon investigation the said contract is found to be assignable, and, in case the said contract is found to be not assignable, then, in that event, he hereby agrees to sublet the contract to said second party at the same price and on the same terms that the said contract may be awarded to him, the said first party. It is further agreed that the said first party shall be held by this contract to the performance of the covenants therein at the option of the said second party at any time between the tenth day of April, 1897, and the tenth day of May, 1897. It is further agreed that in case the said second party does not comply with the terms of this contract in the payment of the sum mentioned herein, that said second party shall be entitled to no compensation for securing said legal notices for publication as hereinbefore stated. It is further agreed that said first party shall assign to said second party all sums due, and owing first party on subscription

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to the 'Silver Blade' on the day of the transfer, together with all sums due or to become due for legal notices, the publication of which shall not at the time of the said transfer be completed except thirty per cent of the amount that may become due for the publication of such of the aforesaid legal notices secured by said second party as shall not at that time be completed. In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

(Signed) "JOHN F. YOST.

(Signed) "J. C. BRADY."

Defendant demurred to the complaint on the ground that it did not "state facts sufficient to constitute a cause of action for want of equity." The demurrer was overruled, and parts of the answer were stricken out on the motion of respondent, and an amended answer was filed. The answer specifically denies many of the allegations of the complaint, and confesses and seeks to avoid others, so that the material issues of the complaint are put in issue. The answer avers that the contract above set forth was entered into for the purpose of carrying out and enforcing the unexecuted provisions of a former contract, which was executed in duplicate, and delivered in duplicate to both the plaintiff and defendant on the eighth day of February, 1897. It is also averred that by the express terms of said last-mentioned contract, for the consideration of one dollar cash in hand paid, and for the further considerations that the plaintiff would obtain for the defendant the publication of certain classified lists of mineral lands referred to in said agreement, and would file a bid for the county printing of Kootenai county, Idaho, to be let by the board of county commissioners of said county in the month of April, 1897, and that the plaintiff would abstain from filing a bid for said printing, the appellant would, according to the terms of said contract, sell and convey to the plaintiff the personal property described in the complaint. It is also averred that one of the considerations of said contract was that plaintiff would exert his political and personal influence with the register of the United States land office, at Coeur d'Alene City, Idaho, to secure for the defendant for publication in said newspaper certain notices of classified lists of mineral lands,

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and that the said lists of mineral lands referred to in the contract of February 8, 1897, are the "legal notices" mentioned in the contract set forth in the complaint. The cause was tried by the court with a jury. The jury was directed to find a special verdict upon particular questions of fact submitted to them by the court in writing. Eight questions asked by the plaintiff and seven asked by the defendant were submitted to the jury, and answered by them. Thereafter, on argument by respective counsel, the cause was submitted to the court for decision and judgment. The court made and filed findings of fact and entered judgment in favor of the plaintiff decreeing the specific performance of said contract. A motion for a new trial was overruled. This appeal is from said order and from the judgment.

The main contentions of appellant are (1) that the contract sued on is contrary to public policy, and therefore void; and (2) that equity will not decree a specific performance of a contract for the sale and delivery of personal property.

As to the first contention, is said contract against public policy, and therefore void, conceding that the contract was merely a substitute for the contract of February 8, 1897? The last-mentioned contract contains the following terms, which are sufficient to show clearly said contention: "The terms of said sale shall be as follows: Seven hundred (\$700) dollars payable on or before delivery of possession by first party to second party of the property mentioned herein, and five hundred (\$500) dollars payable within one year thereafter, which said payment of five hundred (\$500) dollars shall be secured by a promissory note and chattel mortgage on said property, said promissory note to bear interest at the rate of ten (10) per cent per annum. The second party hereby agrees to secure to the said first party the publication of certain classification lists of mineral lands as made by the mineral land commissioners for the state of Idaho, which said lists are now filed or are to be filed in the United States land office at Coeur d'Alene City, Idaho, and in consideration thereof it is hereby agreed that seventy (70) per cent of the amount received by said first party for such publications shall be considered as so much money paid in pur-

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suance of this contract, and applied as a part of the aforesaid seven hundred (\$700) dollars. And it is further agreed between the parties hereto that until such time when the first of the aforesaid lists shall have been handed to the first party for publication this contract shall be inoperative. The said first party further agrees that he will make a reasonable bid for the county printing for Kootenai county, Idaho, to be let by the county commissioners thereof in April, 1897, and, in the event he is awarded the contract therefor, that on compliance with this contract by said second party in the payment of the said seven hundred (\$700) dollars as aforesaid he will assign the said contract to the second party, if upon investigation said contract is found to be assignable, and, in case said contract is found to be not assignable, then, and in that event, he hereby agrees to sublet said contract to said second party at the same price and on the same terms that the said contract may be awarded to him, the said party." As to the stipulation of the respondent to secure for the appellant the publication of certain classified lists of mineral lands, the record shows that one James Graham was the register of the United States land office at Coeur d'Alene City, Idaho. The register of said land office was required by the laws of Congress and the rules and regulations of the land department of the government to have said lists of mineral lands published. The publication thereof was not to be let by bid to the lowest bidder. There were no bids authorized in the letting of said contracts for publication of said lists. The register had the absolute right to select any newspaper of general circulation in said Kootenai county in which to publish such lists. The government paid a fixed price for such publications, and the direction to the register was to publish such lists in a newspaper of general circulation in said county. That said newspaper was one of general circulation in said county is not questioned by the appellant. That the respondent secured said lists for publication as agreed is not denied, and the means and methods used in securing said lists is shown by respondent's own testimony and that of James Graham, the said register. Mr. Brady (respondent) testified on his own behalf as follows: "I did secure those lists. I met

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Mr. Graham in Rathdrum. I asked him about the patronage from the land office, and told him I contemplated purchasing this plant, and asked him if I could get the notices for publication from that office. He replied that he had always aimed to put those notices in the hands of the papers nearest the lands that were classified; that all the lands near Rathdrum had been classified; that he had given, I think, three to the 'Kootenai Herald,' three to the 'Coeur d'Alene Press,' one or two to the 'Hope Examiner,' and one or two to the 'Other Side,' published at Coeur d'Alene City. Well, I asked him if it was not about time for the 'Silver Blade' to have one, and he said that he didn't know whether there would be any more or not; might be a list for January, but he did not think there would be for February or March, as the commissioners were not working. And he said, if there was a list for January, that he would give it to me for publication in the 'Silver Blade.' I think Mr. Graham told me that the price to be paid for the publication of those lists was fixed already by the government, and Mr. Yost told me they were also." Mr. Graham testified on behalf of the plaintiff, and in substance stated that he, as register of the United States land office, awarded the publication of said mineral land classification lists, and that in so doing he was not influenced thereto by any influence exerted on him by the respondent with a view of procuring the transfer of the property described in the agreement sued on herein. The foregoing are substantially the facts showing how and by what means the contract for the publication of the said lists of mineral land was made. It is contended that it is shown in the record that an agreement was entered into whereby the respondent was to attempt for a compensation to influence a public officer in the performance of a duty or the execution of a power, and that such agreement is contrary to public policy, and void; and cites *Tool Co. v. Norris*, 2 Wall. 45; *Oscanyan v. Arms Co.*, 103 U. S. 261, and other cases. Those cases were essentially different from the case at bar. There is nothing in the record showing the means and manner by which said contract was obtained that even hints at the use of sinister or corrupt means. The respondent asked the register of said land office about the

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patronage from that office, and informed him that he contemplated purchasing the "Silver Blade" printing office and plant, and asked him if he could get the legal notices for publication for that office. The register replied that he had always aimed to put such notices in papers nearest the lands that were classified; that the lands near Rathdrum had been classified; that he had given printing to four different newspapers in said county, naming them. Thereupon respondent asked him if it was not about time for him to give some printing to the "Silver Blade." He replied that he did not know whether there would be any more such notices for publication, but, if there were, he would give the publication thereof to the "Silver Blade." Taking into consideration the fact that the price to be paid for such publication had been fixed by the land department of the government, that no bids were required in the letting of the contracts for printing such notices, and the fact of the register giving each of the newspapers in the county a part of such patronage, and all of the facts as shown by the record, it seems to us that the arrangement between the register and respondent, whereby the "Silver Blade" received for publication said notices, was in no sense illegal, or in conflict with public interest. (*Winpenny v. French*, 18 Ohio St. 469; *Stanton v. Embrey*, 93 U. S. 548; *Salinas v. Stillman*, 14 C. C. A. 50, 66 Fed. 677; *Trist v. Child*, 21 Wall. 441; *Chesebrough v. Conover*, 140 N. Y. 382, 35 N. E. 633.) If the court could see wherein this agreement could in any manner put the government of the United States to any loss, or would tend in any manner to corrupt the administration of governmental affairs, or if it were proven that the government official had been unduly influenced or corrupted by this agreement, or that it falls within the strictness of Justice Field in the opinion in *Tool Co. v. Norris*, *supra*, this court would without hesitation hold this agreement contrary to public interest, and void. There is nothing in the agreement or evidence that shows, or tends to show, the object or purpose was to induce an officer to act partially or corruptly.

By one provision of said contract appellant agrees to make a bid for the county printing of Kootenai county, and, in event he is awarded such printing, he will assign the contract for

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said county printing to the respondent, if the contract is assignable, and, in case it is not, he agrees to sublet such printing to the respondent at the same price and on the same terms that said contract may be awarded to the appellant, provided the respondent performed his part of said contract. The appellant avers in his answer that said stipulation was an agreement to suppress competition in obtaining the contract for public printing, which averment is a conclusion. It is no doubt a well-settled rule that any agreement respecting public contracts to be awarded to the lowest bidder, which tends to deprive the government of the advantage of competition in bidding, is unlawful and void. Said provision in the contract had no tendency to prevent competition in bidding for the county printing. The respondent contemplated purchasing the newspaper and printing plant owned by the appellant, and by the terms of the contract of purchase the appellant agreed to bid for the county printing, and, in case he secured the contract, he agreed to assign it to respondent, provided he purchased the newspaper plant of appellant. There was no intention of preventing competition in bidding therefor, so far as the record shows.

The appellant's second contention is that equity will not decree a specific performance of a contract for the sale and delivery of personal property, and especially when the contract bears the least taint of illegality. The latter part of this contention is disposed of by the former part of this decision, where it is held that the contract is in no sense illegal, or in conflict with public interest. As a general rule, equity will not decree a specific performance of a contract relating to chattels. But there are well-defined exceptions to the general rule, and we think the facts of this case bring it within the exceptions. Equity will decree a specific performance of a contract when damages at law will not afford a complete and adequate remedy. In the case at bar the contract was for sale of a certain newspaper business, printing plant, and material used in said business, and contemplated the continuance of said business. This case, we think, comes within the well-recognized exceptions to said general rule, and a specific performance must be decreed.

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as damages at law would not afford as complete and adequate a remedy as a decree for specific performance.

It is contended that the court disregarded several specific findings of the jury, and that the judgment must be reversed for that reason. This is an equitable action for specific performance of a contract, and the defendant was not entitled to a jury, as a matter of right. The jury was required to pass upon certain questions of fact, and its findings were only advisory to the court. After a most careful examination of the evidence, we think the court was justified in disregarding the special findings of the jury referred to. Under the provisions of section 4369 of the Revised Statutes, the appellant contends that he was entitled to a jury trial as a matter of right, that section declaring, *inter alia*, that in actions for the recovery of specific personal property an issue of fact must be tried by a jury, unless a jury is waived. That section recognizes a distinction between law and equity actions. Under it the former must be tried by a jury unless a jury is waived. (See 3 Deering's Cal. Code Civ. Proc., notes to sec. 592.) In equitable actions in this state neither party is entitled to a jury as a matter of right. (*Christensen v. Hollingsworth*, ante, p. 87, 53 Pac. 211.) As the record contains no error, the judgment of the court below must be affirmed, and it is so ordered. Costs of this appeal are awarded to the respondent.

Huston and Quarles, JJ., concur.

Argument for Appellants.

(December 6, 1898.)

COUNTY OF BINGHAM v. WOODIN.

[55 Pac. 662.]

PLEADING.—Where the complaint fails to set forth a material fact essential to the establishment of plaintiff's right to recover, the complaint is bad on general demurrer.

COUNTY ASSESSOR AND TAX COLLECTOR—DEPOSITED ON GENERAL DEPOSIT.—C., as assessor and tax collector for the county, paid into the bank of B. & Co. a sum of money collected by him as such official, and subsequently gave to W., the outgoing treasurer of said county, a check for \$50,539.03, and the cashier of said bank, without the knowledge or consent of the incoming treasurer, passed a portion of said amount to the credit of the incoming treasurer; *held*, that this did not constitute "a deposit on general deposit" by such incoming treasurer.

EVIDENCE, DOCUMENTARY.—In an action on treasurer's bond the plaintiff was permitted, over the objection of defendants, to introduce the ledger of a banking company and to read in evidence certain entries therefrom, there being no proof as to who made the entries or when they were made, or that the treasurer had any knowledge of or ever consented to such entries. *Held*, error.

(Syllabus by the court.)

APPEAL from District Court, Bingham County.

Alfred A. Fraser and Chalmers & Ryan, for Appellants.

The demurrer to the amended complaint should have been sustained because there is no breach of the bond, or the official duty of said defendant Woodin alleged. (*Murback v. State*, 34 Ind. 301; *Bocard v. State*, 79 Ind. 279; *State v. Hebel*, 72 Ind. 361; *State v. Thomas*, 17 Mo. 503; *Supervisors of Franklin v. Kirby*, 25 Wis. 498.) The court erred in admitting in evidence page 442 of the general ledger of the bank of C. Bunting & Co. over the objection of defendants, because there is no evidence that it was a book of original entries, in which the party offering it kept his accounts in the regular course of his business. There is no evidence that the entries therein were made by him at the times they purport to have been so made, and contemporaneous with the transactions which they chron-

Argument for Respondent.

icled. (*Farrington v. Tucker*, 7 Colo. 557; *Hooker v. Johnson*, 6 Fla. 730; *Bower v. Smith*, 8 Ga. 74; *Kibbe v. Bancroft*, 77 Ill. 18; *Rice v. Hodge*, 26 Kan. 164; *Tomlinson v. Borst*, 30 Barb. (N. Y.) 42; 2 Am. & Eng. Ency. of Law, 467; *Chaffee v. United States*, 85 U. S. (18 Wall.) 516.) The court should have excluded said bank-books, as the bank was not a party to this action, and the books of a stranger to the action cannot be admitted in evidence. (*Watrous v. Cunningham*, 65 Cal. 410, 4 Pac. 408; *Kerns v. McKean*, 76 Cal. 87, 18 Pac. 122; *Willis Point Bank v. Bates*, 72 Tex. 137, 10 S. W. 348; *Barnes v. Simmons*, 27 Ill. 512, 81 Am. Dec. 248; *Minton v. Underwood Lumber Co.*, 79 Wis. 646, 48 N. W. 857; *Martin-Brown Co. v. Perrill*, 77 Tex. 199, 13 S. W. 975.) A judgment which is not supported by the pleading is as fatally defective as one which is not sustained by the evidence. (*Bachman v. Sepulveda*, 39 Cal. 688.) The plaintiff cannot have a judgment in direct contradiction of the allegations of his complaint. (*Von Drachenfels v. Doolittle*, 77 Cal. 295, 19 Pac. 518; *Sterling v. Hansen*, 1 Cal. 478.) The plaintiff must recover, if at all, upon the cause of action set out in his complaint, and not upon some other which may be developed by the proofs. (*Mondran v. Goux*, 41 Cal. 151; *Miller v. Hallock*, 9 Colo. 551, 13 Pac. 541; *Reed v. Norton*, 99 Cal. 617, 34 Pac. 333.)

R. E. McFarland and T. M. Stewart, for Respondent.

Where a check drawn upon a bank is presented to it by the holder for deposit to his credit, and the amount is credited to the holder, the legal effect is precisely the same as though the money were first paid out to him, and then by him deposited in the bank. (Daniel on Negotiable Instruments, 1621; *Oddie v. National City Bank*, 45 N. Y. 735, 6 Am. Rep. 160.) The giving of a check becomes, at least after presentment, an assignment to the holder of a sufficient amount of the deposit to pay the check, and therefore a definite appropriation of that sum to its payment, binding upon all the parties to the check. (*Metropolitan Nat. Bank v. Jones*, 187 Ill. 634, 31 Am. St. Rep. 409, 27 N. E. 533; *American Exchange Nat. Bank v. Gregg*, 138 Ill. 596, 32 Am. St. Rep. 173, 28 N. E. 839; *First*

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Nat. Bank v. Leach, 52 N. Y. 350, 11 Am. Rep. 708.) If, at the time the holder hands in the check, he demands to have it placed to his credit, and is informed that it shall be done, or if he holds any other species of conversation which practically amounts to demanding and receiving a promise of a transfer of credit as equivalent to an actual payment, the effect will be the same as if he had received his money in cash and the bank's indebtedness to him for the amount will be equally fixed and irrevocable. (*Morse on Banking*, 321; *National Bank v. Burkhart*, 100 U. S. 686.) Where, under authority from the county treasurer to a tax collector, who is also a bank cashier, to hold and disburse county funds, the latter reports the collection of funds to former and gives him a check therefor, and takes from the treasurer a receipt and the check to be deposited in the cashier's bank and to be paid out on county warrants, the treasurer is chargeable with the money and is estopped to deny its receipt as against the county. (*Kempner v. Galveston Co.*, 76 Tex. 450, 13 S. W. 460; *Bush v. Johnson Co.*, 48 Neb. 1, 58 Am. St. Rep. 673, 66 N. W. 1023, 32 L. R. Ann. 223, 226; *Doll v. People*, 48 Ill. App. 418.) The great weight of authority holds an officer liable for public moneys lost by bank failure. (*State v. Moore*, 74 Mo. 413, 41 Am. Rep. 322; *Ward v. School Dist.*, 10 Neb. 293, 35 Am. Rep. 477; *Lowry v. Polk Co.*, 51 Iowa, 50, 33 Am. Rep. 114; *Omro Sup. v. Kaime*, 39 Wis. 468; *Inglis v. State*, 61 Ind. 212; *State v. Croft*, 24 Ark. 550; *Rose v. Douglass Tp.*, 52 Kan. 451, 39 Am. St. Rep. 354, 34 Pac. 1046; *Griffin v. Mississippi*, 71 Miss. 767, 15 South. 107; *Nason v. Directors*, 126 Pa. St. 445, 17 Atl. 616; *Bush v. Johnson Co.*, 48 Neb. 1, 58 Am. St. Rep. 673, 66 N. W. 1023, 32 L. R. Ann. 223.

HUSTON, J.—This is an action upon the bond of W. A. Woodin, the principal defendant, and the other defendants as his sureties upon the bond of said Woodin as treasurer of Bingham county. Judgment was rendered by the district court against all of the defendants. Motion for a new trial was made and overruled, and from the judgment and the order overruling motion for new trial this appeal is taken.

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The amended complaint sets forth the official character of principal defendant; his election and qualification as such officer; the execution of the bond; and avers that said principal defendant now is the duly elected and qualified treasurer of the said county of Bingham. The complaint then proceeds to set forth the first cause of action, as follows: "That on or about the fourteenth day of January, 1897, Squire G. Crowley had collected, as tax collector of the county of Bingham, and had and sought to pay to the treasurer of said county of Bingham, several sums of money, aggregating more than \$48,719.03, of moneys belonging to said county of Bingham. That the said defendant William A. Woodin did not on said day receive, and has not since or at all received, the said moneys, and did not demand the same in money, as in law he should have done, but in lieu thereof, and as payment of said moneys, he did receive and accept from said Crowley checks and credits on and in the bank of C. Bunting & Co., bankers, a corporation then doing business in the county of Bingham, aforesaid; which said corporation then was, ever since has been, and now is, insolvent, and unable to pay its liabilities as they matured. That the aforesaid checks and credits were worthless, and did not enable the said defendant Woodin to receive the said moneys, or any part thereof, and the said moneys were lost to the plaintiff by the negligence of the said Woodin, treasurer as aforesaid, in not receiving the said moneys, to the damage of the said plaintiff in the sum of \$48,719.03. That said damage has not been paid, nor any part thereof. For a second cause of action, plaintiff alleges: . . . That on or about the fourteenth day of January, 1897, the said defendant Woodin, as such treasurer, did receive from Squire G. Crowley moneys belonging to the said county of Bingham in the sum of \$48,719.03. That said Woodin, as such treasurer, did not safely keep the said moneys, nor any part thereof, but did deposit the same on a general deposit in the bank of C. Bunting & Co., bankers, a corporation then doing business in the said county of Bingham; which said corporation then was, and ever since has been, and now is, insolvent, and unable to pay all its liabilities as they matured. That the said money was never returned to the plaintiff or to

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said treasurer, but was wholly lost to plaintiff, to its damage in the sum of \$48,719.03. That said damage has not been paid, nor any part thereof." A copy of the bond is attached to, and made a part of, the complaint. To the amended complaint the defendants interposed a general demurrer to both causes of action stated; and also a special demurrer, on the ground that two causes of action had been improperly joined, and for ambiguity and uncertainty. The demurrers were overruled, and to such ruling exception was taken by defendants. Defendants then filed answer.

We think the demurrer to the first cause of action should have been sustained. It does not appear that any money was paid to the treasurer by Crowley. That Crowley, the assessor and tax collector, "had and sought to pay to the treasurer" certain sums of money, and in furtherance of that purpose had delivered to the treasurer certain worthless checks upon an insolvent bank, does not, we apprehend, constitute such a payment as would establish the liability of the treasurer or his sureties. Section 1842 of the Revised Statutes provides that "when any money is paid to the county treasurer he must give to the person paying the same a receipt therefor," etc. It is not alleged in the complaint that any receipt was given by the treasurer to Crowley for the checks and credits alleged to have been given by Crowley to him. It might reasonably be presumed from this fact that the treasurer had declined to receive such checks and credits as money.

The statement of the second cause of action is, we think, equally objectionable. It is one of the duties imposed upon the treasurer by law (see Rev. Stats., sec. 1840) to "receive all moneys belonging to the county, and all other moneys by law directed to be paid to him, safely keep the same, and apply and pay them out, rendering account thereof as required by law"; but there is no allegation in the complaint of any failure of this officer to "apply and pay out" the moneys paid to him as such officer, or to "render account thereof as required by law." He is still in office, and it is not alleged that any demand has been legally made upon him which has not been promptly met. The allegation that the treasurer "did deposit the same [i. e.,

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the moneys alleged to have been received by him] on a general deposit in the bank of C. Bunting & Co.," etc., while it would be a proper and necessary averment in a charge, under the provisions of section 6975 of the Revised Statutes, against the treasurer, is not, we think, of itself sufficient in an action against the sureties. It might well occur that the officer could make such "general deposit," and yet the county or its treasury suffer no loss thereby, and in such case there would be no predicate for an action against the sureties. For such an act the law has made the officer personally liable. The liability of the sureties would depend upon the further fact that, by reason of such act of the officer, the county or its treasury has suffered loss, and these facts should be both alleged and proved. The second cause of action contains no such allegation. We think the demurrer to this cause of action should have been sustained.

Inasmuch as the judgment in this case will have to be reversed, and the cause remanded for a new trial, it becomes our duty, under the provisions of section 3818 of the Revised Statutes, to pass upon and determine all the questions of law involved in the case presented upon such appeal and necessary to the final determination of the case.

Plaintiff was permitted, over the objection of defendants, to introduce in evidence the ledger of C. Bunting & Co., and certain entries therein were allowed to be read without any proof of whom the entries were made by, or when they were made, or that Woodin had any knowledge of, or ever consented to, such entries. This was error. The facts in the case are substantially as follows, as developed by the record: It had been the custom, not only of the predecessors in office of the principal defendant, but of all of the officers of Bingham county handling the moneys of said county, to deposit the same in the bank of C. Bunting & Co., at Blackfoot, the county seat of said county—a custom which, though directly in violation of the provisions of the criminal laws of both the territory and the state, has been so persistently pursued that it would almost appear that said officials had concluded their convenience and opportunities were not to be "fobbed by old father antic, the law." In fact, they seem to look upon the law in this behalf as a "mere scarecrow."

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The consequences involved in this case by such action on the part of officials are not novel or unprecedented in this state. The principal defendant herein took office on the eleventh day of January, 1897. He appointed as his deputy one Jenkins, who, it seems, had been the deputy of his immediate predecessor, and it may be for other of his predecessors. On the fourteenth day of January, 1897, one Squire G. Crowley, who had been assessor and tax collector for Bingham county for the two years next preceding, gave to said deputy, Jenkins, who was at the time, and for some years previous had been, the cashier of said C. Bunting & Co., bankers, a check drawn payable to G. G. Wright, the outgoing county treasurer of Bingham county, for the sum of \$50,539.03, which amount was accredited to the account of said G. G. Wright, late county treasurer. Upon the adjustment of the account of said G. G. Wright with said bank, the said Jenkins, deputy and cashier, or somebody else, at some time, made an entry upon the books of said C. Bunting & Co. to the credit of William A. Woodin of the sum of \$41,143.40. There is no date to this entry, nor does it appear by whom it was made, nor that it was made with the knowledge or consent of Woodin. Nor does the record show any check from Wright to Woodin for said sum or any other sum. Woodin testifies: "Mr. Crowley never paid to me, as treasurer of Bingham county, in checks, money, or any other representative of value, the sum of \$41,143.40, and I never had any knowledge of that amount of money being paid into the treasury of Bingham county during my term of office." It would seem, then, from the record, that Crowley had paid into the bank the sum of money, to wit, \$50,539.03, covered by the complaint; that he had checked against it to the full amount in favor of G. G. Wright, the outgoing treasurer; and that Jenkins, the cashier deputy, after balancing Wright's account, passed the balance to the credit of Woodin, or, at least, it may be presumed he did, although of the latter fact there is no direct evidence. There is no evidence, nor do we think it is pretended or claimed, that a dollar of money ever passed in any of these transactions.

The district court in its findings of fact pays but little re-

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gard to the evidence. In its eighth finding the court says: "William A. Woodin, as treasurer aforesaid, did receive and accept from said Crowley checks and credits on and in the bank of C. Bunting & Co., bankers," etc. The evidence upon this point is that Crowley checked to Wright on the 14th of January, 1897, \$50,539.03; and there is no evidence whatever connecting Woodin with Crowley in the matter, or that the transfer of this sum from Crowley to Wright, and from Wright to the credit of Woodin, was known to Woodin at the time. In its ninth finding of fact the court finds "that the aforesaid checks and credits were not worthless, but did enable the said defendant Woodin to receive said moneys, and the whole thereof, and none of the said moneys were lost to the said plaintiff by any negligence of the said Woodin in not receiving money, and the plaintiff was not damaged in any sum thereby." And in its tenth finding the court finds "that on the fourteenth day of January, 1897, said checks and credits were by the said treasurer duly presented to said bank and paid." None of these findings are supported by the evidence, and they are directly in conflict with the allegations of the complaint.

We are apprehensive that the honorable district court, in formulating findings in this case, got the rules and the matter of bankers commingled with the rules of law. The giving of a check by Crowley to, and the acceptance of the same by, Wright, might well operate as payment as between them; but the subsequent transfer upon the books of the bank of a much less sum to the credit of Woodin without his knowledge or consent would hardly operate, we think, as "a deposit upon general deposit," so as to make him amenable to the penalties of the criminal statutes or make him or his sureties liable civilly. The complaint avers that on the fourteenth day of January, 1897, the bank of C. Bunting & Co. "was, and ever since has been, and now is, insolvent, and unable to pay all its liabilities as they matured." C. E. Thum, a witness on the part of the plaintiff, testified: "That on the 14th of January, 1897, when the check for \$50,539.03 was given, there was in the bank upon which it was drawn about \$10,000—not to exceed \$12,000. There were one or two days about that time when cash run to

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a little over \$12,000—about \$12,200—but never over \$13,000. I know this from my inspection of the cash-book as receiver. The entry of \$50,539.03, on the credit side of the account of G. G. Wright as treasurer, on page 442 of the general ledger of the bank, on January 14, 1897, is the same check that was credited to the account of G. G. Wright, and there were not sufficient funds in the bank on that day to pay the check. I do not know upon what date the entry of \$41,142.40 was made to the credit of W. A. Woodin as treasurer. I have examined the cash-book of C. Bunting & Co., bankers, and there was not at any time between the eleventh day of January, 1897, and the fifteenth day of February, 1897, sufficient funds in the bank of C. Bunting & Co., bankers, to pay the check for \$41,142.40." It may be that, viewed from the standpoint of a banker, this condition of things is indicative of solvency; but to the ordinary mind it would, it seems to us, present an entirely different aspect. The finding of the court that Woodin, as treasurer, deposited on general deposit in the bank of C. Bunting & Co., bankers, the sum of \$48,461.51, is not supported by the evidence.

The true facts of the case, as shown by the record, appear to us to be about as follows: Squire G. Crowley, as the assessor and tax collector of Bingham county, had at some time or times prior to January 14, 1897, deposited in the bank of C. Bunting & Co. the moneys collected by him as such officer. On said last-mentioned date he gave to G. G. Wright, the outgoing treasurer of said county, his check for the sum of \$50,539.03, and this check was by Wright presented to the bank, and by the bank placed to his credit; and it would appear that thereafter a certain sum (\$41,142.40) was by some one, but by whom does not appear (but conceding that it was done by the cashier, Jenkins), placed to the credit of W. A. Woodin, treasurer. In making such entry, Jenkins was not acting as the deputy of Woodin. As the deputy of Woodin, Jenkins had nothing to do with the books of C. Bunting & Co. It would be an application of the doctrine of vicarious atonement unknown to the law, and unrecognized by it, to hold Woodin responsible for the acts of Bunting & Co.'s cashier, of which he

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had no knowledge, and to which it does not appear he ever consented. If it is claimed that the acts of Jenkins, as cashier, were known to, and acquiesced in by, him as the deputy of Woodin, and hence become the acts of his principal, we answer that neither the agent nor the principal was authorized to do the act. If the making of the entry to the credit of Woodin was equivalent to a deposit of money on general deposit, as the district court holds, then it was a criminal act on the part of the deputy (if done by the deputy), and cannot bind the principal, unless done with his knowledge, consent, or by his direction. It was an act done outside of his authority as deputy. If the agent goes outside of the scope of his employment to commit a criminal act, the principal is not liable. (Mechem on Agency, sec. 745.) But this act (the making of the entry, as before stated) was done by Jenkins as cashier, and his act as such cashier is relied upon to make the treasurer and his sureties responsible; and that, when it is not made to appear that the treasurer had any knowledge of the transaction or ever assented to it. That Woodin, upon the failure of the bank, attempted to protect the interests of the county by the institution of suit by, of, and under the direction of the chairman of the board of county commissioners of Bingham county, cannot be construed into an acknowledgment that he had knowingly violated the provisions of a criminal statute. That a condition such as we have before described should exist in this state is a thing to be deplored. That the public money, not only of the state, but of nearly, if not all, of the counties, cities, towns, and school districts of the state, should be openly and generally appropriated to banking purposes, for private gain, in the face of the most stringent laws prohibitory thereof, is iniquitous, and cannot but be productive of most disastrous results to the people. If the people of the state desire or are willing that the public moneys should be used in private banking and otherwise, let them see to it that proper laws are enacted to that end, which shall protect the interests of the public, and not, as now, by a tacit acquiescence in violations of the existing law, permit a practice of brigandage upon the public funds as destructive of the public credit and the public weal

Argument for Appellant.

as it is demoralizing to official character and destructive of personal integrity, and must inevitably result in financial disaster. Judgment of the district court is reversed, and cause remanded for further proceedings in accordance with this opinion; costs to appellant.

Sullivan, C. J., and Quarles, J., concur.

ON REHEARING.

(December 31, 1898.)

Per CURIAM.—The petition for a rehearing has been considered, and presents nothing but what was fully considered on the hearing of this case. No reason being presented for granting a rehearing, the same is denied.

(December 8, 1898.)

ADLEMAN v. PIERCE, MAYOR.

[55 Pac. 658.]

CONTRACT BY CITY COUNCIL—ADMINISTRATIVE ACT.—The letting of a contract to do public work by a city council is an administrative, and not a judicial or *quasi* judicial, act.

CERTIORARI—JURISDICTION.—*Certiorari*, denominated writ of review by the Idaho code, will not lie to review the action of a city council in letting a contract to pave a street.

(Syllabus by the court.)

APPEAL from District Court, Ada County.

Hawley & Puckett and John T. Morgan, for Appellant.

The writ of *certiorari* or writ of review is the proper remedy. (See *Orr v. Board of Equalization*, 3 Idaho, 190, 28 Pac. 416; *Dunn v. Sharp*, 4 Idaho, 98, 35 Pac. 842; *Maxwell v. Board of Supervisors*, 53 Cal. 391.) The making of the contract between the city and the said Thomas K. Muir & Co. is not, and was not, authorized by any law relating thereto, and is in ex-

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cess of its authority. The following cases are cited to show that the common-law writ of *certiorari* is the proper remedy for illegal or invalid proceedings of a municipal corporation: 4 Ency. of Pl. & Pr. 113 et seq.; *Mace v. Newberg*, 15 How. Pr. 162; *Banton v. Brooklyn*, 7 How. Pr. 198; *Thatcher v. Dusenbury*, 9 How. Pr. 32; *Maores v. Smedley*, 6 Johns. Ch. 26; *Scribner v. Allen*, 12 Minn. 148. A citizen owner and taxpayer in a city may sue out the writ to review the validity of the ordinance authorizing public improvements, and he need not wait until the expenditures have been made and the assessment has been actually levied upon his property. (*State v. Patterson*, 34 N. J. L. 12.) When a review is sought of the proceedings touching municipal improvements, the writ must be directed to the municipal corporation, or to the board or officers who have control of the record, according to the circumstances of the particular case. (4 Ency. of Pl. & Pr. 177; *State v. Milwaukee*, 86 Wis. 376, 57 N. W. 45; *State v. Fon du Lac*, 42 Wis. 287; *People v. Hill*, 65 Barb. 170; *Harris v. Whitney*, 6 How. Pr. 175; 4 Ency. of Pl. & Pr. 179; *In re Tiffany*, 80 Hun, 486, 30 N. Y. Supp. 494; *Commonwealth v. Winthrop*, 10 Mass. 177; 4 Ency. of Pl. & Pr. 186.) The joinder of persons whose rights and interests are separate and distinct is improper, although they aim to a common result, and to save expense, unite in the prosecution of the writ. (4 Ency. of Pl. & Pr. 174; *Morris Canal Co. v. State*, 14 N. J. L. 411; *Libbey v. West St. Paul*, 14 Minn. 248; *Champion v. Minnehaha Co.*, 5 Dak. 416, 4 N. W. 739.)

Kingsbury & Parsons, W. E. Borah and C. C. Cavanah, for Respondents.

The making of a contract has none of the elements of judicial action. (*Quinchard v. Board of Trustees of Alameda*, 113 Cal. 664, 45 Pac. 85.) The function exercised by a municipal corporation may be legislative, administrative or judicial, but only acts done by it when exercising judicial functions can be reviewed under this procedure. This writ does not lie under our laws to review the action of any tribunal, board or officer in the exercise of functions which are legislative in their character. (*People v. Oakland Board of Education*, 55 Cal. 375.) Whether

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an existing street shall be improved is a question to be trusted to the governing body of a municipality in its legislative capacity, and its determination of that question, as well as upon the character of the improvement to be made, is a legislative act. (Dillon on Municipal Corporations, secs. 94, 929; *Crayton v. Manson*, 27 Cal. 613; *De Witt v. Duncan*, 46 Cal. 343; *Bolton v. Gilleran*, 105 Cal. 244, 45 Am. St. Rep. 33, 38 Pac. 881; 1 Beach on Public Corporations, sec. 543; *People ex rel. Trustees Village of Jamaica v. Board of Supervisors of Queens County*, 131 N. Y. 468, 30 N. E. 488.) When the action of a public officer or of a public body is merely legislative, executive, or administrative, although it may involve the exercise of discretion, it cannot be reviewed by *certiorari*, and so it has been so often held that the rule has become elementary. (*People v. Mayor*, 2 Hill, 9; *In re Mt. Morris Square*, 2 Hill, 14; *People v. Board of Health*, 33 Barb. 344; *People v. Supervisors of Livingston County*, 43 Barb. 232; affirmed, 34 N. Y. 516; *People v. Walter*, 68 N. Y. 403; *People v. Jones*, 112 N. Y. 597, 20 N. E. 577; *Spring Valley Water Co. v. Bryant*, 52 Cal. 232.)

QUARLES, J.—The common council of Boise City passed, on May 8, 1897, an ordinance requiring the grading, curbing, and paving of Main street from the west curb line of Fifth street to the west line of Tenth street, in said city, and providing that part of the cost thereof should be charged to the abutting land-owners. After advertising for bids as required by said ordinance, the council accepted, May 17, 1897, the bid of Thomas K. Muir & Co., and let a contract for the work to said firm. The appellant (one of the abutting owners upon the portion of said street to be paved under said contract) filed on May 24, 1897, in the court below, his petition for a writ of review, for the purpose of reviewing the action of said city council in letting the said contract. An alternative writ was issued, to which return was made by respondents, who moved to quash the writ on divers grounds, one of which was "that the petition for the writ does not state facts sufficient to constitute a cause of action," and another being that the writ would not lie to review the action of the common council complained of, such action

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being administrative, and not judicial. The theory of the plaintiff seems to be that that certain act of the legislature amending the charter of Boise City, approved February 9, 1897 (Sess. Laws 1897, p. 226), is void, first, because it is special legislation, and therefore repugnant to the constitution of Idaho; and, second, for the reason that said act was not passed in the manner required by section 15, article 3, of the constitution; that, said act being void, the said ordinance was unauthorized and void. From these premises plaintiff concludes that the action of the common council in letting said contract was void, and in letting said contract the council exceeded its jurisdiction.

The question that confronts us at the outset is one of jurisdiction. Can the courts of this state review the action of a city council in letting a contract for the making of public improvements? This question is to be determined by the provisions of our code. Revised Statutes, section 4962, is as follows: "A writ of review may be granted by any court except a probate or justice's court, when an inferior tribunal, board, or officer exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy." By the express provisions of the statute the writ lies to review the action of an inferior tribunal, board, or officer exercising judicial functions, where such tribunal, board, or officer exceeds the jurisdiction of such tribunal, board, or officer. The question of jurisdiction is to be determined by the terms of the statute. The authorities cited to us from the common law, and from those states whose statutes are different from ours, have no application here, and are entitled to no weight in determining the question before us. The legislature, having defined the cases in which the writ will lie, have excluded all other cases.

This brings us to the question: In performing the act complained of (i. e., the letting of the said contract), was the common council of Boise City exercising a judicial function? We are compelled to answer this in the negative. None of the acts complained of were judicial acts. The legislature, in passing the act amending the charter of Boise City, was exercising a legislative, and not a judicial, function. The council, in pass-

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ing the ordinance complained of, was exercising a legislative, and not a judicial, function. And, in letting the contract complained of, the council was performing an administrative function, and not a judicial one. Neither of said acts complained of was of a judicial or *quasi* judicial nature. The action sought to be reviewed not being either judicial or *quasi* judicial, the the district court properly quashed the alternative writ and dismissed the proceeding. (*State v. Osburn*, 24 Nev. 187, 51 Pac. 837; *Wulzen v. Board*, 101 Cal. 15, 40 Am. St. Rep. 17, 35 Pac. 353.) The judgment appealed from is affirmed, with costs of appeal to the respondents.

Sullivan, C. J., and Huston, J., concur.

(December 7, 1898.)

CURTIS v. BUNNELL AND ENO INVESTMENT CO.

[55 Pac. 659.]

PLEADING—PROCEDURE.—An amendment to a complaint not in matter of substance and unnecessary to be made is not required to be served upon defendant.

CERTIFICATE OF ACKNOWLEDGMENT.—A certificate of acknowledgment which substantially, complies with the provisions of the statutes is sufficient. (*Hypothek Bank v. Rauch*, 5 Idaho, 750, 51 Pac. 764; *Christenson v. Hollingsworth*, ante, p. 87, 53 Pac. 211, 271.)
(Syllabus by the court.)

APPEAL from District Court, Ada County.

J. T. Morgan and W. E. Borah, for Appellants.

The district courts and the supreme court of this state take judicial notice of their own records. (Idaho Rev. Stats., sec. 5950; Cal. Code Civ. Proc., sec. 1875.) Courts will take judicial notice whatever is established by law. (*People v. Etting*, 99 Cal. 577, 34 Pac. 237.) Matters of which the courts take judicial notice are uniform and fixed, and do not depend upon uncertain testimony. (*Hunter v. New York etc. R. R. Co.*, 116

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N. Y. 615, 23 N. E. 9; *Rogers v. Cady*, 104 Cal. 288, 43 Am. St. Rep. 100, 38 Pac. 81.) The points decided by the supreme court in the case of the Bunnell and Eno Investment Company were, that a defective certificate of acknowledgment of a married woman could be reformed by parol testimony if the proof justifies it; that the presumption is that the findings were made and filed in the absence of proof to the contrary. (*Bunnell & Eno Inv. Co. v. Curtis*, 5 Idaho, 652, 51 Pac. 767.) Where counsel appears expressly for certain defendants in an action, his signature to papers after that time as attorney for defendants is limited to those defendants for whom he expressly appeared. (*Spenagel v. Delinger*, 42 Cal. 148.) A. A. Fraser appeared for Susan L. Curtis—never for E. J. Curtis. Service of amended complaint on attorney who has not appeared for that party is void. (*Powers v. Braly*, 75 Cal. 237, 17 Pac. 197.) Amended complaint must be served upon all parties. (*Thompson v. Johnson*, 60 Cal. 292; *Vermont Loan etc. Co. v. McGregor*, 5 Idaho, 510, 51 Pac. 104.) A defendant cannot appear in an action so as to give the court jurisdiction of his person except by answering, demurring or giving plaintiff written notice that he appears, and the service of notice of appearance must antedate or be contemporaneous with the service of papers. (*Steinbach v. Leese*, 27 Cal. 295.) Where there is no service of the amended complaint upon the husband in foreclosure of mortgage on separate property of the wife, the judgment is void. The husband being a necessary party, and the judgment being void as to him, it is also void as against the wife. (*Vermont L. & T. Co. v. McGregor*, 5 Idaho, 510, 51 Pac. 104; *Lowe v. Turner*, 1 Idaho, 107.) While the certificate of acknowledgment of Susan L. Curtis has been acknowledged by the complaint in the case of *Bunnell and Eno Investment Company v. Curtis and Curtis*, and by the district court in the judgment in the same case, and substantially by the supreme court on appeal, to be defective, it is thought best to present some authorities on precisely the same form of certificate. In *Beck v. Soward*, 76 Cal. 527, 18 Pac. 650, 651, the supreme court of California, June 9, 1888, held this certificate to be fatally defective and under the same statute. The same decision upon the same

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form was made in 1893 in *Hutchinson v. Ainsworth*, 63 Cal. 286; *Kennedy v. Gloster*, (1892), 98 Cal. 143, 32 Pac. 941. In the case of *Hypothek Bank v. Rauch*, 5 Idaho, 750, 51 Pac. 764, and *Christensen v. Hollingsworth*, ante, p. 87, 53 Pac. 211, the certificates of acknowledgment were materially different from the one at bar and were properly held to be substantially sufficient.

J. H. Richards, E. J. Dockery and Wyman & Wyman, for Respondents.

The language of Freeman, section 498, which immediately follows the portion of the same section quoted by appellants' counsel: Nevertheless a decided preponderance of the decisions upon this subject declare that, notwithstanding an alleged want of service of process, a court of equity will not interfere to set aside a judgment until it appears that the result will be other or different from that already reached; or, in other words, that there was a defense to the action, either entire or partial. (*Taggart v. Wood*, 20 Iowa, 236; *Gregory v. Ford*, 14 Cal. 138, 73 Am. Dec. 639; *Crawford v. White*, 17 Iowa, 560; *State v. Knorr*, 11 Wis. 389; *State v. Hill*, 50 Ark. 458, 8 S. W. 401; *Gifford v. Morrison*, 37 Ohio St. 502, 41 Am. Rep. 537.) If stipulations are made in the presence of the court, it is immaterial whether they be oral or written, or whether they be expressed or plainly inferred from the conduct on which the opposite attorney and the court have a right to rely. (Jones on Evidence, sec. 259; *Wilson v. Spring*, 64 Ill. 14; *Loomis v. New York etc. R. Co.*, 159 Mass. 39, 34 N. E. 82.) This court has held acknowledgments practically identical with this one to be a substantial compliance with the law. (*Hypothek Bank v. Rauch*, 5 Idaho, 750, 51 Pac. 764; *Christensen v. Hollingsworth*, ante, p. 87, 53 Pac. 211.)

HUSTON, J.—This action is brought by the plaintiffs to set aside and have declared void a judgment of foreclosure of mortgage made and entered by the district court for Ada county on April 6, 1895. The complaint set forth the execution of the notes and mortgage by the defendants Susan L. Curtis and Edward J. Curtis, her husband; that the property set forth and de-

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scribed in the mortgage was at the date thereof the sole and separate property of the said Susan L. Curtis; and avers that said mortgage was absolutely void, and of no force and effect, as against the said Susan L. Curtis, and as against her property therein named. The complaint further avers: That on the twenty-second day of December, 1894, the mortgagees in said mortgage (defendants herein) commenced suit to foreclose said mortgage by filing complaint against said Susan L. Curtis and Edward J. Curtis, her husband. That said Edward J. Curtis and Susan L. Curtis, his wife, appeared in said action, and filed a demurrer to said complaint, on the third day of January, 1895. That on the twenty-eighth day of January, 1895, said Susan L. Curtis filed her separate answer to the complaint in said action, wherein she alleges that the signing of said notes and mortgage was an involuntary act on her part, and done without any consideration, and that said act was done by her under duress; denies acknowledgment of said mortgage; and avers that said notes, though joint in form, were the individual notes and obligations of the said Edward J. Curtis, and prays that they may be canceled. That thereafter, on the twenty-fifth day of February, 1895, the plaintiffs in said action (defendants herein) filed an amended complaint in said action, alleging therein as matter of amendment that the acknowledgment of said mortgage by said Susan L. Curtis, a married woman, was legally and properly made at the time it bears date, but that the certificate of acknowledgment attached to said mortgage was defective in that, by mistake or inadvertence of the officer making the same, said certificate fails to show that upon an examination without the hearing of her said husband the said Susan L. Curtis was made acquainted with the contents of the instrument; and prays that said certificate of acknowledgment as shown upon said mortgage be corrected and reformed in accordance with the facts in this case. On the twenty-fifth day of February the following stipulation was filed in said action:

“It is hereby stipulated and agreed by and between S. L. Tipton, attorney for plaintiffs, and Alfred A. Fraser, attorney for defendants, E. J. Curtis and Susan L. Curtis, that the amended and supplemental complaint may be filed the same as if it were

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the original complaint in the action; and the said Alfred A. Fraser, attorney for defendants, therefore waives all notice and other proceedings as to the filing of notice and affidavits in supplemental complaint.

“Signed the twenty-fifth day of February, 1895.

“ALFRED A. FRASER,
“Attorney for Defendants.”

That on the twenty-fifth day of March, 1895, it was stipulated and agreed by the attorney for the plaintiffs in said action (defendants herein) that the answer of said Susan L. Curtis to the complaint in said action should stand and be considered by the court as the answer to the amended complaint therein, and that all the allegations of the said amended complaint in regard to the reformation of the certificate of acknowledgment of said mortgage therein described should be deemed specially denied by said answer. On the sixth day of April, 1895, the following stipulation was filed in said cause:

“It is hereby stipulated by and between the parties to this action and their attorneys that the court may enter judgment reforming the certificate of acknowledgment in accordance with the prayer of plaintiffs’ amended complaint herein, and that judgment may be entered for the plaintiffs against the defendants, Edward J. Curtis and Susan L. Curtis, for the sum to be found due thereon, decreeing the foreclosure of the mortgage as in plaintiffs’ complaint, and that a stay of execution be granted to the defendants for one year from the date of said judgment, said judgment to bear interest at the rate of eight per cent (8 per cent) per annum.

(Signed) “S. L. TIPTON,
“Attorney for Plaintiffs.
“ALFRED A. FRASER,
“Attorney for Susan L. Curtis.”

On the sixth day of April, 1895, decree of reformation and foreclosure was entered by the court in said action, and is in the words and figures following: “This cause having been this day brought on to be heard on the plaintiffs’ amended complaint filed herein, and upon the answer of Susan L. Curtis thereto, and the cross-complaint of Remus Goodrich and Thomas Kitto, and

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the court having heard the evidence on the part of the plaintiffs, and upon answer of Susan L. Curtis, and the court having heard the proof, and duly considered the same, in said case, and it appearing therefrom to the satisfaction of the court that the acknowledgment to said mortgage as set forth in plaintiffs' amended complaint was duly and properly taken in conformity with law, but was defectively certified, it is hereby ordered, adjudged, and decreed, that the certificate of acknowledgment as set forth in the plaintiffs' amended complaint be amended and reformed in conformity with the prayer of said amended complaint; and it is further ordered and decreed, in accordance with the stipulations of the parties filed herein, and the court having heard proofs necessary to render judgment herein, and it appears to the court from the proofs made herein that there is now due the plaintiffs from the said defendants—and thereupon the court proceeds to render judgment against said defendants for the sum of \$5,251.50, to foreclose the said mortgage, to decree a sale of said premises to satisfy the same, and for a deficiency judgment for residue that might remain unpaid." The complaint sets up several causes of action, but, as they are all embodied in the specification of errors, it is not essential to repeat them here. Demurrers were interposed to the complaint of plaintiffs by all of the defendants, which demurrers were sustained by the court, and judgment of dismissal of action entered, from which judgment this appeal is taken.

The appellants set up three assignments of error: 1. That the judgment is void for uncertainty, for that the judgment is that the certificate of acknowledgment, as set forth in the plaintiffs' amended complaint, be amended and reformed in conformity with the prayer of said amended complaint. There is no amendment of the certificate of acknowledgment whatever. This contention is predicated upon the assumption that the certificate of acknowledgment was defective. Said certificate is as follows:

"State of Idaho, }
County of Ada. } ss.

"On this third day of November, A. D. one thousand eight hundred and ninety-two (1892), personally appeared before me

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Jonas W. Brown, a notary public in and for said county, Susan L. Curtis and Edward J. Curtis, husband and wife, whose names are subscribed to the annexed instrument as parties thereto, personally known to me to be the same persons described in and who executed the said annexed instrument as parties thereto, and who, each of them, acknowledged to me that they, each of them, respectively, executed the same freely and voluntarily, and for the uses and purposes therein mentioned. And the said Susan L. Curtis, wife of the said Edward J. Curtis, having been by me first made acquainted with the contents of said instrument, acknowledged to me, on examination apart and without the hearing of her husband, that she executed the same freely and voluntarily, without fear or compulsion, or undue influence of her husband, and that she does not wish to retract the execution of the same. In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written. My commission expires on the thirteenth day of November, 1893.

[Seal]

“JONAS W. BROWN,
“Notary Public, Boise City, Idaho.”

We held in *Bank v. Rauch*, 5 Idaho, 150, 51 Pac. 764, and in *Christensen v. Hollingsworth*, ante, p. 87, 53 Pac. 211, 271, that such a certificate was a substantial compliance with the statute. The certificate being sufficient, no amendment of the complaint for the purpose of reforming it was necessary, and consequently it was not essential to incorporate such reformation in the decree. The trial court erred in treating the amendment as material, but such error wrought no prejudice to the defendants in that action. Under the rule laid down by the court in *Trust Co. v. McGregor*, 5 Idaho, 510, 51 Pac. 104, and in the authorities cited in that case, the amendment must be material to make service thereof necessary.

The second assignment of error is that “the judgment is void because the said complaint was amended in a material matter, and the said amended complaint was never served upon E. J. Curtis nor upon his attorney.” As already stated, the amendment to the complaint was not material. Where the amendment is not material, and, *a fortiori*, where it is entirely unnecessary,

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service of the amended pleading is not required. It is only where the amendment is in matter of substance that service is necessary. (*Thompson v. Johnson*, 60 Cal. 292; *Harney v. Corcuran*, 60 Cal. 314; *Brock v. Martinovich*, 55 Cal. 516.) It appears by the record that on the twenty-fifth day of February, 1895, the date of the filing of the amended complaint, E. J. Curtis and Susan L. Curtis, by Alfred A. Fraser, their attorney, entered into a stipulation to the effect that the amended and supplemental complaint may be filed the same as if it were the original complaint in the action, etc. The fact that the same attorney who appeared for E. J. Curtis and Susan L. Curtis in this stipulation had four days previous filed a separate answer in the case for said Susan L. Curtis, militates nothing against his appearance for E. J. Curtis on the 25th of February, especially when his right to so appear has never been denied or questioned. It is true, counsel for appellants makes the statement in his brief that "A. A. Fraser appeared for Susan L. Curtis, never for E. J. Curtis," but this statement is not only not supported by, but is directly contradicted by, the record. We should hardly feel justified in even inferentially charging an attorney of this court with having appeared without authority in any case under such circumstances.

Appellants' third specification of error is:

"Because judgment cannot be rendered upon one of two joint debtors by confession of one. In such case the judgment is void as to both." We are somewhat at a loss to understand what counsel means by judgment by confession, as applied to this case. The case, as stated by the court, was heard upon complaint, answer, and proofs. It is true that upon the same day judgment was entered the parties, by their attorneys, entered into a stipulation, entirely for the benefit of the defendants, whereby plaintiffs consented to a stay of execution for one year from the date of the judgment, with interest at eight per cent per annum—two per cent less than they were entitled to under the statutes. We fail to find anything in the record that resembles "a judgment by confession." We think the order and judgment of the district court was entirely correct. Judgment of district court affirmed, with costs to respondents.

Sullivan, C. J., and Quarles, J., concur.

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Argument for Respondent.

(December 10, 1898.)

KING v. OREGON SHORT LINE RAILWAY.

[55 Pac. 665.]

RAILROAD COMPANY—KILLING OF STOCK—PLEADING—NEGLIGENCE.—

Under subdivision 2, section 4168 of the Revised Statutes, which requires the complaint to contain a statement of the facts constituting the cause of action in ordinary and concise language, a general allegation of negligence, while good against a general demurrer, is not good against a demurrer on the ground of uncertainty.

(Syllabus by the court.)

APPEAL from District Court, Bannock County.

P. L. Williams and Joseph H. Blair, for Appellant.

All the code states have, in substance, the same provision found in our Idaho Code, subdivision 2, section 4168, requiring the complaint to contain "a statement of the facts constituting the cause of action, in ordinary and concise language." And these states—some by special demurrer on the ground of uncertainty, and others by motion to make more definite and certain—all provide a way of requiring the pleader to comply with this provision. Illustrative of this proposition, and in point, as well, in support of this demurrer, is the case of *Stephenson v. Southern Pacific Co.* (from the supreme court of California) 102 Cal. 143, 34 Pac. 618, 36 Pac. 407. (*Woodward v. Oregon Ry. etc. Co.*, (supreme court of Oregon), 18 Or. 289, 22 Pac. 1076.) The burden of proof is upon the plaintiff to establish negligence on the part of the defendant—that the mere killing of stock by a railroad company by running its engines and cars over one's stock does not establish a *prima facie* case of negligence, so as to shift and throw the burden of excusing upon the defendant. (*Cateril v. U. P. R. Co.*, 2 Idaho, 576, 21 Pac. 416; *Spokane etc. Ry. Co. v. Holt*, 4 Idaho, 443, 40 Pac. 56.)

W. T. Reeves, for Respondent.

Mr. Estee, in his work on Pleading second volume, section 2005, page 35, gives the approved form in California, in actions

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of this kind (ordinary cases of stock killing). This form was practically followed in drawing the complaint in this action. In support of the rule we contend for we cite the following authorities: Bliss on Code Pleading, 3d ed., art. 211a; *Cunningham v. Los Angeles Ry. Co.*, 115 Cal. 561, 47 Pac. 452; *Davies v. Oceanic Steamship Co.*, 89 Cal. 283, 26 Pac. 827; *Stephenson v. Southern Pacific Ry. Co.*, 102 Cal. 143, 34 Pac. 618, 36 Pac. 407; *Railroad Co. v. Wolfe*, 80 Ky. 84; *House v. Meyer*, 100 Cal. 592, 35 Pac. 308; *Scott v. Hogan*, 72 Iowa, 614, 34 N. W. 444; *Rogers v. Truesdale*, 57 Minn. 126, 58 N. W. 688; *Jones v. Darden*, 90 Ala. 372, 7 South, 923; *Texas etc. Ry. Co. v. Easton*, 2 Tex. Civ. App. 378, 21 S. W. 575; *Louisville etc. Consolidated R. Co. v. Hicks*, 11 Ind. App. 588, 37 N. E. 43, 39 N. E. 767; *Benjamin v. Holyoke etc. Ry. Co.*, 160 Mass. 3, 39 Am. St. Rep. 446, 35 N. E. 95; *Louisville etc. Ry. Co. v. Berkey*, 136 Ind. 181, 35 N. E. 3.)

Action by W. H. King against the Oregon Short Line Railway Company to recover value of cattle alleged to have been killed by negligence of defendant. Judgment for plaintiff. Defendant appeals. Reversed.

This action was brought by the respondent to recover the value of four head of cattle alleged to have been killed by appellant's locomotives and cars—one alleged to have been killed on May 7, 1897; one on May 10, 1897; one on August 5, 1897; and one on November 5, 1897. The killing of each animal is set up as a separate cause of action. The third paragraph of each cause of action, which contains the allegations of the careless and negligent killing of said stock, is couched substantially in the same language, and in the first is as follows, to wit: "That the defendant, by its agents and servants, not regarding its duty in that respect, so carelessly and negligently ran and managed its locomotives and cars that the same ran against, upon, and over said steer, and killed and destroyed the same, to the damage of the plaintiff in the sum of eighteen dollars, no part of which has been paid." The total value of the four head is alleged to have been seventy-eight dollars. To each of said causes of action the defendant, who is appellant here, interposed a demurrer on the ground of uncertainty, and dis-

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tinctly specifies that each of said causes of action is uncertain in several particulars, and among them the following: 1. It does not state any facts constituting negligence or carelessness on the part of any agent or servant of the defendant, or of the defendant; 2. It does not state any act or omission on the part of any agent or servant of the defendant, or of the defendant, or of anyone, constituting negligence or carelessness. The demurrer was overruled, and appellant declined to answer or further plead, whereupon judgment was given and entered in favor of the plaintiff. This appeal is from the judgment.

SULLIVAN, C. J. (After Stating the Facts.)—There is but one question presented by the record, and that is: In actions based on negligence, is it sufficient to plead negligence generally, or must the specific acts of commission or omission be specifically set out in the complaint? It is conceded by counsel for appellant that the complaint in this action would be good as against a general demurrer, to wit, a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action, and that it is sufficient to sustain a verdict or judgment, unless attacked by a demurrer on the ground of uncertainty, specifically setting forth wherein it is uncertain. While counsel for respondent concede that, if the facts are sufficiently within the knowledge of the pleader, it would be better pleading to plead them, they also contend that the rule of pleading negligence is so thoroughly settled in this country that it is no longer an open question, and the rule is to the effect that it is unnecessary to plead the particular acts or omissions that constitute the negligence, and cite *Bliss on Code Pleading*, 3d ed., sec. 211a; *Cunningham v. Railway Co.*, 115 Cal. 561, 47 Pac. 452; *Stephenson v. Southern Pac. Co.*, 102 Cal. 143, 34 Pac. 618, 36 Pac. 407, and numerous other cases. It is said in *Bliss on Code Pleading*, third edition, section 211a, that a general allegation of negligence is allowed; that negligence is the ultimate fact to be pleaded, and is not a conclusion. Referring to negligence and fraud, it is said: "The law draws the conclusion in both cases, yet we can see that the negligence possesses more of the element of fact than does fraud.

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. . . . We do not infer it as a legal conclusion from certain facts, but it is a fact itself inferable from certain evidence. . . . Fraud will never be presumed. The facts from which it is inferred must be shown." And, after giving some examples and citing authorities, the author concludes said section as follows: "Some negligence is presumed, and it must, of necessity, be alleged generally." Simply because "some negligence will be presumed," certain facts being shown, we are unable to comprehend that for that reason "negligence must, of necessity, be alleged generally." If certain facts must be shown before negligence will be presumed, the plaintiff must know these facts before he can show them; and, if he knows them, he certainly can allege them, and thus inform the defendant of the specific facts from which the conclusion of negligence is drawn. If, under the laws of this state, the killing of a steer by a locomotive engine or train of cars were made *prima facie* evidence of negligence, then, such killing being alleged in the complaint, a cause of action would be stated. But, under the statutes of this state, something more than the killing must be shown, in order to entitle plaintiff to recover. He must not only show the killing, but he must show the certain other fact or facts from which the conclusion of negligence will be inferred or drawn. And, if a plaintiff must show acts or omissions from which negligence will be inferred before he can recover, it certainly is no hardship on him, nor unreasonable, to require him to allege them. Subdivision 2, section 4168 of the Revised Statutes provides that the complaint must contain "a statement of the facts constituting the cause of action in ordinary and concise language." The causes of action in this case are based on the negligent killing of certain animals. Under said provision of the statute, the complaint must contain a statement of the facts constituting the negligent killing, in "ordinary and concise language." In *Stephenson v. Southern Pac. Co.*, *supra*, the facts constituting the negligence were stated in the complaint in ordinary and concise language. The court, after stating that at common law it was necessary, in a declaration for negligence, to set out the facts, in detail, constituting the basis of the action, says: "In adopting what is known as the 'code

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system of pleading,' courts in most of the states have excepted from the general rule, requiring a complaint to state the facts constituting the cause of action in ordinary and concise language, cases founded upon negligence, or, rather, they have so far modified the rule as to permit the plaintiff to state the negligence in general terms, without stating the facts constituting the negligence." If it be true that the courts of most of the states have excepted from the general rule, which requires a complaint to state the facts constituting the cause of action in ordinary and concise language, cases founded on negligence, or rather, have so far modified that provision of the statute as to permit the plaintiff to state negligence in general terms, without stating the facts constituting the negligence, this court is not inclined to follow them. No doubt, we have much good court-made law; but, when we have a plain provision of the statute—too plain for construction—if it requires modification, the legislative department of the state may do that. This court will not undertake it. The legislature has furnished the basis of decision as to the facts a complaint must contain, and courts are bound by it. In the case last cited the court further said: "The statement of other facts auxiliary to this main fact [negligence] might have tended to a clearer conception of the principal act, but the most there can be said against the pleading is that it states a cause of action, but states it imperfectly, which is the equivalent of saying that it is good except as against a special demurrer." So we think in the the case at bar the complaint sufficiently states a cause of action, except as against a special demurrer on the ground of uncertainty. The demurrer should have been sustained, and the defendant permitted to amend his complaint by setting forth the facts constituting the negligence. In *Woodward v. Navigation Co.*, 18 Or. 289, 22 Pac. 1076, which was a case founded on negligence, the court says: "Our code (section 66) requires the complaint to contain a plain and concise statement of the facts constituting the plaintiff's cause of action, and one of the great objects to be attained by this enactment was to compel the plaintiff to place upon the record the specific and particular facts which he claims entitles him to recover," and holds that

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the plaintiff must allege in the complaint the acts or omissions of the defendant causing the injury, and show that they occurred through or by the negligence of the defendant. That decision recognizes the fact that in some jurisdictions it is sufficient to allege generally that the injury complained of was negligently done, but declares that that method of pleading has not been approved in that state. In *McPherson v. Bridge Co.*, 20 Or. 486, 26 Pac. 560, the supreme court of Oregon holds that in actions for negligence a general allegation of negligence does not charge a fact. In *Batterson v. Chicago etc. Ry. Co.*, 49 Mich. 184, 13 N. W. 508, the court held that the plaintiff, in negligence cases, is "bound to set out the combination of material facts relied on as his cause of action, and follow up his allegations by evidence pointing out and proving the same combination of circumstances." (See, also, *Pullman Palace Car Co. v. Martin*, 92 Ga. 161, 18 S. E. 364; *Steffe v. Old Colony R. R. Co.*, 156 Mass. 262, 30 N. E. 1137; *Conley v. Richmond etc. R. R. Co.*, 109 N. C. 692, 14 S. E. 303; *Price v. Water Co.*, 58 Kan. 551, 62 Am. St. Rep. 625, 50 Pac. 450.) We are aware that there is very respectable authority which holds that a general allegation of negligence is sufficient, and that at common law it was not necessary, in a declaration for negligence, to set out the facts constituting the negligence. But our Code of Civil Procedure has greatly changed the common-law rules of pleading, and requires the facts constituting the cause of action to be set forth in ordinary and concise language. And in the case at bar facts sufficient should have been set forth to inform the defendant what act or omission constituted the negligence complained of. The judgment of the court below is reversed with instructions to sustain the demurrer, and to give the plaintiff leave to amend his complaint. The costs of this appeal are awarded to appellant.

Huston and Quarles, JJ., concur.

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(December 12, 1898.)

WEBSTER v. OREGON SHORT LINE RAILWAY.

[55 Pac. 661.]

FOREIGN CORPORATION—DESIGNATED AGENT—VENUE OF ACTIONS IN JUSTICE'S COURT.—By complying with the requirements of law as to the appointment of an agent upon whom process may be served, a foreign corporation doing business in Idaho requires the same rights, but no greater than those of a citizen, so far as the venue of actions against it are concerned.

SAME—JURISDICTION.—Under the provisions of section 4639 of the Revised Statutes, a foreign corporation doing business in this state may be sued in a justice's court in the precinct in which an injury to property occurs, to recover damages for such injury, although such precinct may be in a county other than the one in which its principal place of business is, and its duly designated agent to receive process for it resides.

(Syllabus by the court.)

APPEAL from District Court, Bear Lake County.

P. L. Williams and Joseph H. Blair, for Appellant.

The defendant below, having complied with the provisions of section 2653 of the Revised Statutes of Idaho, as approved by the decision of this court in the case of *Easley v. New Zealand Ins. Co.*, 4 Idaho, 205, 38 Pac. 405, was of the opinion, and is now, that the county in which the action was commenced was not the proper county for the trial thereof, and that under the provisions of section 4124 of the Revised Statutes of Idaho, it might, by filing a demurrer and an affidavit of merits at the time of appearing, also demand in writing that the trial be had in the proper county. (*Heald v. Hendy*, 65 Cal. 321, 4 Pac. 27; *Williams v. Keller*, 6 Nev. 141; *Buck v. Eureka*, 97 Cal. 135, 31 Pac. 845.)

T. L. Glenn, for Respondent, cites no authorities upon the point decided.

QUARLES, J.—This action was commenced by the plaintiff in the justice's court in and for Montpelier, in Bear Lake

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county, before G. C. Hillier, J. P., to recover damages for the negligent killing of three head of horses, in the sum of \$100. The defendant demurred to the complaint, and filed with its demurrer an affidavit of merits, in which affidavit it is also made to appear that the defendant is a foreign corporation doing business in this state, having its principal place of business in this state, in Bannock county, and that it has, by writing filed with the Secretary of State of the state of Idaho, and also with the clerk of the district court of said Bannock county, designated Joseph H. Blair, a person residing in the city of Pocatello, in said Bannock county, as its agent upon whom service of process issued by authority of, or under any law of, this state may be served; and also a demand in writing for a change of venue of said action from said Bear Lake county to said Bannock county. Said demand was denied by the justice's court, whereupon the defendant objected and protested against said court proceeding further in the action; but the court overruled the said demurrer, and, the defendant failing to answer, the evidence was heard, and judgment made and entered in favor of the plaintiff for \$100 damages, and costs taxed at twenty-four dollars and fifty cents. From this judgment the defendant appealed to the district court in and for Bear Lake county, in which court defendant, on said affidavit and demand, renewed its motion for a change of venue, which motion was denied; and from the order denying the change of venue this appeal was taken.

The only question before us for determination is, Was the defendant entitled to the change of venue demanded? This depends upon whether the justice's court in Bear Lake county had jurisdiction to try the case or not. The appellant contends that by complying with the provisions of section 2653 of the Revised Statutes, as construed by this court in *Easley v. Insurance Co.*, 4 Idaho, 205, 38 Pac. 405, relative to the designation of an agent upon whom process might be served, the defendant acquired a residence in Bannock county, and was entitled to a trial there. Under said authority we would have to sustain the appellant's contention, if this suit had been commenced in a district court. This case is unlike the case of *Eas-*

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ley v. Insurance Co., supra, and is not controlled by the decision in that case. The jurisdiction of a justice's court is fixed by section 4639 of the Revised Statutes, the third subsection of which fixes the venue of cases like the one at bar in the precinct or city where the injury was committed, or where the defendant resides. Said subsection reads as follows: "(3) In case of injury to the person or property; in the precinct or city where the injury was committed, or where the defendant resides." Under the provisions of sections 2653 and 4639 of the Revised Statutes, *supra*, the justice's court in the precinct or city where the injury occurred had jurisdiction to try the action, and the plaintiff could elect between the two named justices' courts. The authorities cited by appellant are not in point. By complying with the law relating to the designation of a person upon whom process may be served, a foreign corporation obtains the same rights as a citizen, so far as the venue of action is concerned, but no superior rights to the citizen.

It is alleged in the complaint that the injury complained of occurred on the track of the defendant, "at or near mile post number 94½, in the county of Bear Lake, and state of Idaho." There is no showing that the injury did not occur in the precinct in which the action was commenced. The district court properly denied the motion of the defendant for a change of venue, and the order appealed from is affirmed. The cause is remanded to the district court for further proceedings consistent with this opinion. Costs of this appeal awarded to the respondent.

Sullivan, C. J., and Huston, J., concur.

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(December 12, 1898.)

GEO. H. FULLER DESK COMPANY v. STATE.

[55 Pac. 857.]

RECOMMENDATORY DECISION UNDER SECTION 10, ARTICLE 5, OF CONSTITUTION.—Where furniture for legislative halls has been purchased, received and accepted, the legislature should appropriate sufficient to pay for the same; not to do so is unfair, inequitable and savors of repudiation.

(Syllabus by the court.)

An original proceeding under section 10 of article 5 of the constitution.

C. C. Cavanah, for Plaintiff.

R. E. McFarland, Attorney General, for the State.

No briefs filed.

Plaintiff sold and delivered to the state certain goods—necessary furniture for the use of the state legislature. It is stipulated that the goods, consisting of twenty-one walnut desks and twenty-one walnut chairs, were, when delivered, of the value of \$1,240; that said goods were furnished the defendant in October and November, 1896; that plaintiff's account therefor was presented to the state board of examiners in 1896, and by said board allowed in full, and through said board presented to the legislature for its allowance and payment by appropriation of public revenue to said extent; that said legislature appropriated and set apart for the purpose of paying on said account to plaintiff the sum of \$700, which amount has been paid on account for said goods, leaving a balance thereon due to the plaintiff. Plaintiff commenced this action in this court to obtain a recommendatory decision of this court touching plaintiff's rights, under the provisions of section 10 of article 5 of the constitution.

QUARLES, J. (After Stating the Facts.)—The apportionment act of 1893 increased the representation of the two houses of the legislature to the extent of eighteen members

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from what it was under apportionment temporarily made by the constitution. A short time prior to the convening of the fourth session of our state legislature, the executive department, in order to provide suitable desks and seats for the increased membership, ordered new desks and chairs for the senate chamber, and moved those theretofore in the senate chamber to the hall of the house of representatives. The idea, doubtless, was to have all of the desks and chairs in each house of the same material and workmanship. This was proper. The furniture procured for the senate was such as the dignity of the state and of the senate demanded—i. e., such as was suitable. It is argued that the price charged is a reasonable price. The account for the goods was presented by the plaintiff to the state board of examiners for allowance, and was by said board allowed. The legislative department accepted the goods in question, and used them. There was no appropriation or fund available out of which to pay the plaintiff's claim. The question of paying the same was presented to the legislature, and \$700 appropriated to pay on said account, leaving a balance thereon of \$540. Having accepted the goods, common honesty, fairness, equity, and good conscience demand that the plaintiff should be paid the balance on said claim. There is resting upon the state a legal and moral obligation to pay the claim in question. The credit and good name of the state require its payment. The legislature, if it thought the goods were unnecessary, or not worth the amount allowed by the executive department, or that they were purchased without authority, should have refused to accept the goods. Having accepted them, the legislative department ratified the act of the executive department in purchasing the goods. Now, for the state to keep said goods, and pay only a little more than half of their value, would look like repudiation and sequestration. It should be the policy of the state to meet all of its just obligations. Its failure to do so would bring it into disrepute, with the result that it would, in an emergency like the one which the executive endeavored to meet by preparing for the proper reception, convenience, and comfort of the senate and house of representatives, be unable to procure such things

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as it needs. We recommend that the claim of the plaintiff for \$540, with two years' interest thereon, be paid, and direct the clerk of this court to certify this decision to the legislative department. The attorney general concurs in the views herein expressed.

Sullivan, C. J., and Huston, J., concur.

(December 14, 1898.)

DEEDS v. STRODE.

[55 Pac. 656.]

ILLEGAL MARRIAGE—DIVORCE—DAMAGES.—Plaintiff, a married woman having a husband from whom she had never been lawfully divorced, married defendant; the latter marriage having been declared null and void, plaintiff brings action to recover damages from defendant for injuries alleged to have been received by her from defendant while they were cohabiting together, by reason of the defendant's having inoculated her with a venereal disease. *Held*, that it not appearing that defendant had induced plaintiff to enter into marital relations with him by any fraud, deceit or misrepresentation, no recovery could be had.

(Syllabus by the court.)

APPEAL from District Court, Ada County.

Hawley & Puckett and E. J. Dockery, for Appellant.

It is a universal rule urged by the defendant's counsel, and admitted by the plaintiff, that no action exists in favor of the wife for an injury done her by her husband, however grievous. A different rule, however, applies in case of a marriage being declared a nullity, as in this case. "The parties stand as if they had always remained single." "The woman is relieved of her incapacity to sue and be sued." If the woman is entrapped into a void marriage, she may recover damages for that tort. (Nelson on Divorce and Separation, sec. 1023.) So the wife, it is held, cannot sue for wages, but her remedy is in tort for the damages done her. (Nelson on Divorce and

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Separation, sec. 1023; *Robbins v. Potter*, 98 Mass. 532; *Blossom v. Barnett*, 37 N. Y. 434, 97 Am. Dec. 747; *Cooper v. Cooper*, 147 Mass. 370, 9 Am. St. Rep. 721, 17 N. E. 892.) The law implied a promise to pay for services where the wife was led into the marriage relation by fraud. (*Higgins v. McNally*, 9 Mo. 493.)

W. E. Borah, for Respondent.

The plaintiff at the time she received her alleged injuries occupied, in contemplation of law, one of two positions: she was either the wife of the defendant and must be treated as such in this action, or she was living with him in voluntary violation of law, both statutory and moral. She could occupy no modified ground, although she says in her complaint she "truly believed she was his wife." As a matter of law, she could not truly believe it, and, as a matter of fact, she knew her divorce was through fraud; yet, even if she did truly believe it, this would not change the law of the case. If she could be treated as the wife of the defendant for the purposes of action, she could not have a cause of action against her husband for tort. (*Banfield v. Banfield*, 117 Mich. 80, 72 Am. St. Rep. 550, 75 N. W. 287; *Abbott v. Abbott*, 67 Me. 304. 24 Am. Rep. 27; *Peters v. Peters*, 42 Iowa, 182; *Frethy v. Frethy*, 42 Barb. 641; *State v. Oliver*, 70 N. C. 60; Cooley on Torts, 2d ed., 216; *Nickerson v. Nickerson*, 65 Tex. 283.) Under our statute the plaintiff, Flora A. Deeds, was guilty of bigamy at all times while she was living with Strode, and could have been convicted as a bigamist; in other words, she was living in open violation of law. (Idaho Rev. Stats., secs. 6805, 6806; *Davis v. Commonwealth*, 2 Am. Cr. Rep. 163.) The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation. (*Hall v. Coppell*, 7 Wall. 244; *Holt v. Green*, 73 Pa. St. 198, 13 Am. Rep. 737.)

HUSTON, J.—This is an action for damages brought by the plaintiffs, husband and wife, against the defendant. A demurrer was interposed by the defendant to the complaint of

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the plaintiff upon the ground that the complaint does not state facts sufficient to constitute a cause of action. This demurrer was sustained, and from the judgment entered thereon this appeal is taken.

This action is brought by and for the benefit of the plaintiff, Flora A. Deeds. The complaint states that said Flora A. and her said husband "have, by mutual agreement and understanding, lived separate and apart from each other for more than seven years last past," and "that plaintiff Rufus M. Deeds is made a party hereto by reason of his being the husband of the plaintiff, Flora A. Deeds, and for that reason only." The complaint further states that in the year 1890, at the town of Eugene, in the state of Oregon, plaintiff, Flora A. Deeds, and her said husband, Rufus M., separated, and have since that time lived separate and apart from each other; that in February, 1892, the plaintiff, Flora A. Deeds, commenced suit in the district court for Ada county, Idaho, against her said husband to procure a divorce; that such proceedings were had in said suit that on the twenty-second day of December, 1892, a judgment and decree were entered in said court pretending to grant a decree of divorce to said plaintiff, Flora A. Deeds, from the said Rufus M. Deeds; that on the thirty-first day of October, 1893, at Boise City, in Ada county, Idaho, the plaintiff Flora A. Deeds, believing, by reason of the judgment and decree hereinbefore referred to, that she was a single woman, and no longer the wife of plaintiff, Rufus M. Deeds, at the solicitation and request of the defendant assented to a marriage ceremony being performed between them, and they were at said time and place married, and from that time, and at all times until the twenty-sixth day of February, 1897, lived together in Ada county as husband and wife; that on the fourteenth day of May, 1897, the plaintiff, Flora A. Deeds, still believing she was the wife of defendant, and that the decree and judgment hereinbefore referred to granting a divorce from her said husband, Rufus M. Deeds, was in full force and effect, commenced in the district court for Ada county, Idaho, an action for divorce against the defendant herein, alleging as the basis and grounds of said divorce cruel and inhuman

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treatment on his part. Defendant filed a cross-complaint in said action, alleging that the marriage between himself and the said plaintiff, Flora A. Deeds, was null and void, among other things, because the court, in granting the divorce between herself and plaintiff, Rufus M. Deeds, had no jurisdiction to make or enter such judgment and decree; whereupon, and on the twenty-ninth day of November, 1897, and after said cause had been heard and determined in said district court, said court rendered its judgment, deciding, among other things, that the judgment and decree in said cause of Deeds against Deeds was null and void, and appeal from said judgment of the district court to the supreme court of the state of Idaho was taken by said Flora A. Deeds, and the said judgment and decree of the district court was by said supreme court affirmed (*Strode v. Strode*, ante, p. 67, 52 Pac. 161); that while the plaintiff, Flora A. Deeds, was living with the defendant as his wife aforesaid, and believing herself to be his wife as aforesaid, and in the month of May, 1895, in Ada county, state of Idaho, the defendant, without fault of said plaintiff, and without her knowledge, connivance, privity, or consent, became affected with a certain loathsome and infectious disease, commonly and generally known as gonorrhea, and communicated said disease to plaintiff, and infected her therewith. The complaint then goes on to elaborate the sufferings of plaintiff by reason of said disease, and the neglect and ill-treatment of her by the defendant, and closes with a demand for damages in the sum of \$25,000.

It does not appear that the defendant in any way misled the plaintiff, that he made any false representations to her, or practiced any fraud upon her, to induce her to enter into the marriage relation with him. If there was fraud or deceit practiced in bringing about the relation, it was presumably, under the statements in her complaint, attributable to the plaintiff. She was the incapacitated party. It was by her procuration—upon her motion—that the pretended divorce from Deeds, her former husband, had been procured. She was in a position to know, and is presumed to know, whether that divorce was legal or not; whereas the defendant cannot be presumed to have any knowledge or information upon that sub-

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ject. There is no allegation in the complaint that defendant knew of the existence of the divorce in Deeds against Deeds. The plaintiff, holding herself out as one capacitated and qualified to enter into the marriage relation, accepted the proposals of the defendant to, and did, enter into such relations with him. Her act was at least a fraud upon the defendant. Plaintiff claims that by, through, and in consequence of said relations she has been damaged, and asks the court to award her compensation for such damage. We know of no principle of law or equity which will support this contention. Appellants' counsel cite Nelson on Divorce and Separation, section 1023. The language there used is as follows: "The woman is relieved of her incapacity to sue and be sued. She may sue the man who has entrapped her into a void marriage, and compel him to account for rents and profits of property he took under such marriage. Where a woman is induced by fraud and deceit to enter into a void marriage, she may recover damages for such tort without first having the marriage annulled." This may be accepted as a correct statement of the law; but how is it made applicable to the case made by the record under consideration? The plaintiff has undoubtedly the right to sue and be sued, but to avail herself of that right she must, like every other person, have a cause of action. There is no question of property rights involved in this case. It is not claimed that the plaintiff brought to the community any estate or property whatever, or that the defendant derived any pecuniary benefit from said relation. The complaint alleges that the defendant is the owner and possessed of property of the value of \$150,000. It is not claimed or pretended that the plaintiff was "induced by fraud and deceit to enter into a void marriage." The case of *McDonald v. Fleming*, 12 B. Mon. 285, cited in note to section 1023 of Nelson on Divorce and Separation, was one in which the parties, after having cohabited together as husband and wife for several years, separated, and the woman brought action to recover for her services during the time of such cohabitation, and also for money advanced by her to the defendant for the purchase of certain real estate. The court held that, while she could not recover for services,

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she might for the money advanced, and so decreed. The parties in that case were *in pari delicto*. While this decision supports the text in Nelson, it has no application to the facts in the case at bar. *Blossom v. Barrett*, 37 N. Y. 434, 97 Am. Dec. 747, cited by appellants in their brief, was an action brought by the plaintiff to recover damages of the defendant for fraudulently inducing the plaintiff to marry the defendant, and to cohabit with him, he having another wife living, from whom he was not lawfully divorced, and the defendant being at the time incapacitated to marry anyone while his prior wife was living." The plaintiff's right to recover in that case was based upon the fraud of the defendant. It could not be considered an authority in support of the contention of the plaintiff in this case. In *Robbins v. Potter*, 98 Mass. 532, cited by appellants, the plaintiff sued to recover money advanced to defendant by her while they were living together as husband and wife under a marriage which both parties knew to be void. The court in that case held, in substance, that while the plaintiff would not be allowed to recover for services rendered to defendant during the existence of the illegal relation between them, still she could recover for money loaned defendant during that period, and which he had expressly contracted to pay. *Cooper v. Cooper*, 147 Mass. 370, 9 Am. St. Rep. 721, 17 N. E. 892, cited by appellants, was an action for services—held no recovery could be had. The case of *Higgins v. Breen*, 9 Mo. 497, is not in point—another case of fraud by defendant. We have examined carefully all of the cases cited by counsel, and have found not one which supports, even by implication, the contention of appellants. Cooley on Torts, page 279, has under the head of "Fraudulent Marriage," the following: "A serious wrong can be accomplished by inducing anyone, through misrepresentation and fraud, to enter into an illegal marriage. . . . The tort in such a case consists in the fraud accomplished, to the woman's serious, and perhaps permanent, injury." Counsel for appellants insist that, the injury of which plaintiff complains having been the result of the wrongful act of defendant, plaintiff should be entitled to recover therefor, the same as though defendant had assaulted or

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poisoned her. We do not recognize the parallel contended for. The injury complained of in this case could scarcely have arisen but for the illegal relations existing between the parties, and such relations were entered into voluntarily by plaintiff, and were not induced by any fraud or misrepresentation on the part of the defendant; and the plaintiff's incapacity to enter into marriage relations constituted the illegality. The injury was consequent upon her own illegal act, and we know of no principle of law authorizing recovery for injuries in such a case. Judgment of the district court affirmed, with costs to respondent.

Sullivan, C. J., and Quarles, J., concur.

(December 16, 1898.)

STATE v. THUM, RECEIVER.

[55 Pac. 858.]

PUBLIC MONEY—TRUST FUND, WHEN DEPOSITED IN BANK—BELONGS TO TRUE OWNER.—Public money deposited by a public officer in a bank becomes a trust fund, and not part of the estate of the bank, and, in case of the insolvency of the bank, its receiver must treat such fund as the property of the true owner, and not of the bank.

INSOLVENT BANK—CREDITORS OF.—The creditors of an insolvent bank are not entitled to share *pro rata* in public money deposited in such bank.

PLEADING.—A defect in a complaint may be cured by allegation in the answer.

(Syllabus by the court.)

APPEAL from District Court, Bingham County.

R. E. McFarland, Attorney General, and Hawley & Puckett, for Appellant.

The money belonging, as it did, to the state, and being deposited in the bank by the treasurer, made it a trust fund and gave the state, as the true owner, the right to recover the

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amount from the bank assets, regardless of the fact that it had mingled with other funds, and that such amount of money had not been kept on hand. (*Wolfe v. State*, 79 Ala. 201, 58 Am. Rep. 590; *Van Alen v. American Nat. Bank*, 52 N. Y. 1; *Merrill v. Bank of Norfolk*, 19 Pick. 32; *National Bank v. Insurance Co.*, 104 U. S. 67, and cases cited.) When a public treasurer, without authority of law, deposits public moneys in bank as treasurer, the title of the moneys does not pass to the bank, although there is no agreement that the identical bills shall be returned, and they are mixed with the bank's general funds, and the county is entitled to recover an equal amount from a receiver of the bank prior to the payment of the general depositors. (*San Diego County v. California Nat. Bank*, 53 Fed. 59; *Hot Springs School Dist. v. First Nat. Bank*, 61 Fed. 417; *Myers v. Board of Education*, 51 Kan. 87, 37 Am. St. Rep. 263, 32 Pac. 658, 662; *Foster v. Rincker*, 4 Wyo. 484, 35 Pac. 470; *Hubbard v. Alamo Irr. Co.*, 53 Kan. 637, 36 Pac. 1053-1055, 37 Pac. 625; *City of Larned v. Jordan*, 55 Kan. 124, 39 Pac. 1030, 1031; *Ryan v. Phillips*, 3 Kan. App. 704, 44 Pac. 909, 910; *State v. Midland State Bank*, 52 Neb. 1, 66 Am. St. Rep. 484, 71 N. W. 1011; *Shepherd v. Meridian Bank*, 149 Ind. 20, 48 N. E. 352; *Kimmel v. Dickson*, 5 S. Dak. 221, 49 Am. St. Rep. 869, 58 N. W. 561, 25 L. R. A. 309; *Mechem on Public Officers*, sec. 922; *Farmers' Bank v. King*, 57 Pa. St. 202, 98 Am. Dec. 215; *Boone on Banking*, sec. 285; *Baker v. New York Nat. Bank*, 100 N. Y. 31, 53 Am. Rep. 150; *People v. City Bank*, 96 N. Y. 37; *Burnett v. First Nat. Bank*, 38 Mich. 630; *Skinner v. Bank*, 4 Allen, 290; *Allen v. St. Louis Bank*, 120 U. S. 40, 7 Sup. Ct. Rep. 460; *Boone on Banking*, sec. 62; *State v. Midland State Bank*, 52 Neb. 1, 66 Am. St. Rep. 484, 71 N. W. 1011; *Independent Dist. of Boyer v. King*, 80 Iowa, 497, 45 N. W. 909.) Sureties—subrogation of to rights of obligee. (*Murfree on Official Bonds*, sec. 671; 2 *Brandt on Guaranty and Suretyship*, 465, 479, note; *City of Keokuk v. Love*, 31 Iowa, 119; *Appeal of Lebanon Co. (Pa.)*, 19 Atl. 303; *Blake v. Traders' Nat. Bank*, 145 Mass. 13, 12 N. E. 414, 418; *Livingston v. Anderson*, 80 Ga. 175, 5 S. E. 49.) Separate accounts of a party kept in distinct characters at a

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bank must be kept distinct, and a trust account cannot be applied to pay a debt due on a personal account. (Morse on Banking, 40; Boone on Banking, secs. 65, 66, 285, 289; *National Bank v. Insurance Co.*, 104 U. S. 54, 68; *Union Stockyards Bank v. Gillespie*, 137 U. S. 422, 11 Sup. Ct. Rep. 118; *International Bank of Chicago v. Jones*, 119 Ill. 407, 59 Am. Rep. 807, 9 N. E. 886; *Coates v. Preston*, 105 Ill. 470, 473, and cases cited; *Pennell v. Deffel*, 4 De Gex, M. & G. 383, 390.)

Lyttleton Price, for Respondent.

The deposit being a general deposit, is, in legal effect, a loan to the bank. The state treasurer may not loan public moneys. If he does so, the state cannot seek to recover the money loaned without ratifying the loan. This could be done only by legislative authority, if at all. (*State v. Keim*, 8 Neb. 63; Approved in *First Nat. Bank v. Gandy*, 11 Neb. 431, 9 N. W. 566; *State v. Bartley*, 39 Neb. 353, 58 N. W. 172, 176.) When a depositor makes a general deposit in a bank the relation of debtor and creditor is established. (*Janin v. London etc. Bank*, 92 Cal. 14, 27 Am. St. Rep. 82, 27 Pac. 1100; *State v. Buttles*, 3 Ohio St. 309; *Bank v. Windisch etc. Co.*, 50 Ohio St. 151, 40 Am. St. Rep. 660, 33 N. E. 1054; *Henry v. Martin*, 88 Wis. 367, 60 N. W. 263; *McLain v. Wallace*, 103 Ind. 562, 5 N. E. 911; *Alston v. State*, 92 Ala. 124, 9 South. 732; *State of New York v. Mechanics' etc. Institution*, 1 Am. & Eng. Corp. Cas. 573; *Balbach v. Frelinghuysen*, 15 Fed. 675; 5 Thompson on Corporations, secs. 7098, 7101; Story on Bailments, Bennett's ed., sec. 88; *Ruffin v. Board Co. Commrs.*, 69 N. C. 498, 509; *Brahm v. Adkins*, 77 Ill. 263; *Keene v. Collier*, 1 Met. (Ky.) 415). The addition of Storer's official title does not affect the character of the deposit nor change his relation to the bank as its creditor. (*Alston v. State*, 92 Ala. 124, 9 South. 732; *Otis v. Gross*, 96 Ill. 612, 36 Am. Rep. 157, 159; *McLain v. Wallace*, 103 Ind. 562, 5 N. E. 911; *Citizens' Bank v. Alexander*, 120 Pa. St. 476, 14 Atl. 402; *Eyrman v. St. Louis Bank*, 84 Mo. 408; *Swartout v. Bank*, 5 Denio, 555; *German Bank v. Heinstedt*, 42 Ark. 62; *Lowry v. Polk Co.*, 51 Iowa, 50, 33 Am. Rep. 114, 115, 49 N. W. 1049.) Where the

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deposit is not special there is no trust relation. (5 Thompson on Corporations, secs. 7102, 7104; 2 Story's Equity Jurisprudence, sec. 1259; 2 Pomeroy's Equity Jurisprudence, sec. 1058; *Multnomah Co. v. Oregon Nat. Bank*, 61 Fed. 912; *St. Louis etc. Assn. v. Austin*, 100 Ala. 313, 13 South. 908; *Bank v. Smith*, 15 Fed. 858; *Ind. Dist. Pella v. Beard*, 83 Fed. 5-17.)

Petition by the state, on the relation of J. H. Anderson, state auditor, and R. E. McFarland, attorney general, in an action by the First National Bank of Pocatello against C. Bunting & Co. The respondent, C. E. Thum, was appointed receiver of C. Bunting & Co., bankers, an insolvent corporation, on the fifteenth day of February, 1897, by order of the district court of the fifth judicial district, made in the action brought by the First National Bank of Pocatello against said C. Bunting & Co., bankers. On February 8, 1898, the state ex rel. J. H. Anderson, state auditor, and R. E. McFarland, attorney general, pursuant to order of said district court granting leave so to do, filed its petition in said action, in which it is alleged: That one George H. Storer, was duly elected at the regular November election in 1896 state treasurer of the state of Idaho, and duly qualified as such officer, and assumed the duties of said office; that said Storer, as such treasurer, has deposited in and with said C. Bunting & Co., bankers, large sums of money, belonging to the state, and which came to his hands as such treasurer; that said moneys were received by said C. Bunting & Co., bankers, and credited on its books to said George H. Storer as treasurer, with full notice and knowledge that said moneys belonged to and were the property of the state; that said corporation is insolvent, and has suspended payment, and is unable to pay its indebtedness, and that there came to the hands of the respondent, C. E. Thum, as receiver of said banking corporation, the sum of \$11,101.16, money of the state; that the state has demanded payment of said sum from said receiver, but said receiver fails and refuses to pay same to the state; that said receiver has disbursed large portions of the assets of said banking corporation, and threatens and intends to pay out and distribute the remaining assets of said banking corporation remaining in his hands, and said

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money of the state, to the creditors of said corporation; that said receiver claims that said money deposited by said Storer as treasurer belongs to, and is a part of, the estate of the said corporation, and will, unless otherwise directed by the court, pay out said money to the creditors, whereby same will be lost to the state. To this petition the respondent made answer, in which he denies that said Storer deposited any sum or sums of money belonging to the state; that there is a credit on the books of said C. Bunting & Co., bankers, to the credit of said Storer, state treasurer; that said credit is the result of deposits of checks made by said Storer; that when said Storer came into office as such treasurer there were, to the credit of C. Bunting, state treasurer, his predecessor, large sums of money deposited in said bank by his predecessor; that said Storer received from his predecessor a check for such sum; and that said Storer continued to keep, as state treasurer, with said bank, an account based upon credit received from checks from his predecessor, and other checks, and that said Storer deposited no money or cash in said bank. The evidence shows that C. Bunting, former treasurer, gave to his successor, George H. Storer, state treasurer, January 6, 1897, a check for \$32,702.58, and which check was credited by said bank to said Storer, state treasurer; that C. Bunting, as state treasurer, deposited funds of the state with said bank, and there was to his credit, as such treasurer, in said bank, on January 6, 1897, more than \$32,702.58. Said Storer, state treasurer, deposited other checks in said bank, and drew his checks thereon, leaving, on February 15, 1897, a balance to his credit as state treasurer of something over \$11,101.16. On the trial, after the above facts had been proven, the respondent moved for a nonsuit, which the trial court granted, whereupon judgment was entered dismissing the appellant's petition. From this judgment the state appeals. The evidence is set forth in appellant's bill of exceptions. Reversed.

QUARLES, J. (After Stating the Facts.)—The contention of the respondent that public money deposited in a bank on general deposit, by a public officer, in violation of law, becomes the estate and property of the bank, the owner of the money so

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deposited, contrary to its will, becoming a mere creditor of the bank, raises the principal question in this case. The district court sustained this contention. We are unable to do so. The position of the state in this case is unlike that of an ordinary depositor in a bank. A party who deposits money in a bank on general deposit voluntarily becomes the creditor of such bank, and, impliedly at least, agrees that the bank may commingle such money with its own, and use it until called for by such depositor. The relation of debtor and creditor arises by mutual consent. Not so in the case at bar. The state never consented to become the creditor of C. Bunting & Co., bankers. It never deposited, or consented that the funds in question should or might be deposited, with said bank on general deposit. On the other hand, the state absolutely prohibited the making of such deposit. Sections 6975-6977 of the Revised Statutes, are as follows:

"Sec. 6975. Each officer of this territory, or of any county, city, town, or district of this territory, and every other person charged with the receipt, safekeeping, transfer, or disbursement of public moneys, who either:

"1. Without authority of law, appropriates the same or any portion thereof to his own use, or to the use of another; or,

"2. Loans the same or any portion thereof; or, having the possession or control of any public money, makes a profit out of, or uses the same for any purpose not authorized by law; or,

"3. Fails to keep the same in his possession until disbursed or paid out by authority of law; or,

"4. Deposits the same or any portion thereof in any bank, or with any banker or other person, otherwise than on special deposit; or,

"5. Changes or converts any portion thereof from coin into currency, or from currency into coin or other currency, without authority of law; or,

"6. Knowingly keeps any false account, or makes any false entry or erasure in any account of or relating to the same; or,

"7. Fraudulently alters, falsifies, conceals, destroys, or obliterates any such account; or,

"8. Willfully refuses or omits to pay over, on demand, any

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public moneys in his hands, upon the presentation of a draft, order, or warrant drawn upon such moneys by competent authority; or,

“9. Willfully omits to transfer the same, when such transfer is required by law; or,

“10. Willfully omits or refuses to pay over to any officer or person authorized by law to receive the same, any money received by him under any duty imposed by law so to pay over the same; is punishable by imprisonment in the territorial prison for not less than one nor more than ten years, and is disqualified from holding any office in this territory.

“Sec. 6976. Every officer charged with the receipt, safekeeping, or disbursement of public moneys, who neglects or fails to keep and pay over the same in the manner prescribed by law, is guilty of felony.

“Sec. 6977. The phrase ‘public moneys,’ as used in the two preceding sections, includes all bonds and evidence of indebtedness, and all moneys belonging to the territory, or any city, county, town, or district therein, and all moneys, bonds, and evidences of indebtedness received or held by territorial, county, district, city or town officers in their official capacity.”

The former treasurer, C. Bunting, had no authority to deposit public money in the bank of C. Bunting & Co., bankers, on general deposit. The bank had, and was charged with express notice that the state treasurer had, no authority to make such general deposit. More than that; the bank, nor the officers of said bank, after receiving said money, could mingle it with the funds of the bank, or loan it, or make profit out of it, or appropriate it, without committing a felony. If a bank receives public money, it must do so on special deposit. It must keep such money separate from its own funds. It must not use it or loan it. If any of these acts are committed, the persons or officers who participate are guilty of a felony. Now, it must necessarily follow that, the state treasurer, having no authority to deposit public money with a bank on general deposit, but he being authorized to deposit such money with a bank on special deposit, the instant that C. Bunting & Co. received public money from the state treasurer, it did so

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on special deposit, and that if the officers or any officer of said bank thereafter used said money, or commingled it with the money of the bank, or loaned it, such officers or officer, by such act, committed a felony. The bank could not appropriate it. Hence it did not become the estate or property of the bank. If the bank was still doing business, it could not claim the money in controversy, or any part thereof, as its own. It could assert no claim adverse to the state to such money, or any part thereof. The respondent, as receiver of said bank, can assert no claim to said money which the bank could not itself assert if it was still doing business. The creditors of the bank have no interest or claim upon said money. The joint wrong and criminal act of the agent of the state and of the officers of the bank does not redound to the financial interest of the creditors of the bank. The bank received the money in trust for the true owner, the state. It must be regarded as a trustee. (*Wolfe v. State*, 79 Ala. 201, 58 Am. Rep. 590; *Bank v. Hummel*, 14 Colo. 259, 20 Am. St. Rep. 257, 23 Pac. 986; *State v. Midland State Bank*, 52 Neb. 1, 66 Am. St. Rep. 484, 71 N. W. 1011; *Foster v. Rincker*, 4 Wyo. 484, 35 Pac. 470; *Kimmel v. Dickson*, 5 S. Dak. 221, 49 Am. St. Rep. 861, 58 N. W. 561; Mechem on Public Officers, sec. 922; *Winslow v. Iron Co.* (Tenn. Ch. App.), 42 S. W. 698; *Hubbard v. Manufacturing Co.*, 53 Kan. 637, 36 Pac. 1053, 37 Pac. 625; *Ryan v. Phillips*, 3 Kan. App. 704, 44 Pac. 909; *City of Larned v. Jordan*, 55 Kan. 124, 39 Pac. 1030.) We could cite many other authorities to the same effect. In *Vane v. Towle*, 5 Idaho, 471, 50 Pac., we said, at page 1008: "Trustees must, in dealing with trust funds, and with the beneficiaries thereof, show the utmost good faith and fair dealing. They can make no profit out of the trust funds, nor obtain any advantage over the beneficiaries of such funds; and a trustee cannot assert an adverse claim to funds which he receives in his fiduciary capacity." The respondent, as receiver, is in the same position as the bank. He can assert no adverse claim against the state to the money in question. That fund, being a trust fund, is no part of the insolvent bank's estate. It must be paid to the state before the bank's estate is distributed. Creditors of a bank

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need not expect, under the laws of this state, to have public funds in the bank distributed among themselves in case of the failure of such bank. Could it be contended that if A robbed B of a large sum of money, and then went into insolvency, that that money should be distributed among A's creditors? Certainly not. We cannot give our consent to the doctrine or theory that if two persons, in handling a particular fund, commit a felony with reference to such fund, their criminal act divests the owner of title, or creates the relation of debtor and creditor between the true owner of such fund and the parties who commit the criminal act.

The respondent insists that the motion for nonsuit was properly granted on the ground of variance between the allegation and proof. It is true that the evidence shows that some or all of the money in question was deposited with C. Bunting & Co., bankers, by the former treasurer, and not by the present one. In this respect the petition is defective. But such defect is cured by the allegations of the answer, wherein it is alleged that such money was placed in said bank by C. Bunting, former treasurer, who gave his check therefor to Treasurer Storer. The judgment appealed from is reversed, and the cause remanded to the district court, with instructions to enter judgment in favor of the state as demanded in the petition, and to direct the respondent, C. E. Thum, as receiver, to pay the said judgment out of assets of the said C. Bunting & Co. in his hands before any distribution of such assets among the creditors of said banking corporation. Costs of appeal to be paid out of funds in the hands of said receiver.

Sullivan, C. J., and Huston, J., concur.

ON REHEARING.

(January 11, 1899.)

HUSTON, C. J.—A rehearing is asked in this case principally upon the ground that the respondent had no opportunity of presenting any evidence in the court below. It seems to us, this claim comes a little late. The record shows that when the

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case was called for trial the respondent was placed on the stand by plaintiff, and testified as follows:

"I am the receiver in the cause of *First National Bank of Pocatello v. C. Bunting & Co., Bankers*, and have been since February 15, 1897, and prior to that time had been, an employee in the bank of C. Bunting & Co. Have charge of the books of that bank. C. Bunting was state treasurer of Idaho prior to the beginning of the term of office of George H. Storer, the present treasurer. In January, 1897, Bunting, as treasurer, turned over to Storer, as his successor, the office of state treasurer. Part of the state money was on deposit in the Capital State Bank of Boise City, and part in the Bank of C. Bunting & Co., Blackfoot. The books of C. Bunting & Co., bankers, show that there was deposited to the credit of George H. Storer, as state treasurer, on January 6, 1897, the sum of \$32,702.58, and that afterward there was deposited by said treasurer the sum of \$8,477.27, and that there was paid out upon the checks of the treasurer and for state warrants all of said amounts except the sum of \$12,683.93, shown by the books to be due, but which has been reduced by reason of certain interest amounts paid out, and not determined at the time the bank was closed, but which I have, as receiver, since ascertained to be the sum of \$11,022.38.

"The account of C. Bunting, as state treasurer for 1897, as shown by the book of original entries, in which said account was kept, is as follows:

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C. Bunting, State Treasurer.

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1897.

1897.

Jan. 4	163,162,164	7	991 85	Jan. 2	Bal. L.	299	34,726 80
5		9	504 16				28 21
6		12	32,702 58				
7		13	350				
8		15	150				
	Balance		28 21				28 21
			28 21				28 21
				Feb. 15	Balance		28 21

"The account of George H. Storer, as state treasurer, as shown by said book, is as follows:

1897.

1897.

George H. Storer, State Treasurer.

Jan. 27		35	351 15	Jan. 6		11	32,702 58
28		36	114 66	29		37	8,477 27
Feb. 11		52	9,173 27				40,714 04
13	State Warr'ts Balance	54	19,552 84 12,683 93	Feb. 1		40	696
			41,410 04				41,410 04
				Feb. 15	Balance		12,683 93

"(To the introduction of said accounts as evidence the defense objected on the grounds that it was incompetent, immaterial, and irrelevant. Objection overruled, and exception taken.)

"The book from which these accounts are taken is the general ledger of the bank, which is a book of original entries, and the only book of the bank which shows accounts. The entry on the Storer account of \$32,702.50 represents that part of the fund which was on deposit in the bank at Blackfoot, turned over by C. Bunting to Storer at the time Bunting turned over the office of state treasurer. This sum was turned over by means of a check drawn by C. Bunting, state treasurer, on C. Bunting & Co., bankers, and payable to George H. Storer, treas-

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urer. The other entries in the Storer account represent checks turned into the bank by Storer. It was the custom in the bank to credit the checks received, when they were considered good, at the time of their receipt. There is nothing in the bank to show any of these checks were dishonored, and, as a matter of fact, they were all paid."

The testimony of the respondent was the only oral proof offered in the case, and, together with the exhibits produced by him, constitute all the evidence in the record. After the evidence was closed, the respondent moved for a nonsuit, which was granted.

How can the respondent claim that he had no opportunity to present any evidence? While respondent was upon the stand he was subjected to a very rigid cross-examination by his own attorney, during which, in answer to certain interrogatories propounded to him, he stated, in substance: That on the sixth day of January, 1897, the amount of money in the bank of C. Bunting & Co. was about \$11,000; that, up to a short time before failure, the daily balance averaged about \$10,000. The contention of respondent is that there never was any money deposited by Storer; that he only deposited checks. These checks were under the provisions of section 6977 of the Revised Statutes of Idaho, "public moneys," and as such were deposited by the treasurer, Storer, in the bank of C. Bunting & Co., and were so received by said bank, and were made available by the treasurer in paying the indebtedness of the state; \$41,410.04 was so deposited by the treasurer, and of this amount, according to the testimony of respondent, all but \$11,022.38 was checked out by the treasurer, and yet counsel contends that no money was ever deposited. This contention seems to us a *non sequitur*. The law made the checks of Bunting or anyone else in the hands of the treasurer "public moneys." As such they were deposited by the treasurer, and were checked against by him in paying liabilities of the state, and all such checks were paid. Respondent appears to lay considerable stress upon the fact that the average daily balances in the bank from January 6th to the time of the failure were only about \$10,000. While not as conversant with the details of the banking business as the learned

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judge of the district court, or the learned counsel, it seems to us that the daily balances, as shown by the books of the bank, could hardly be accepted as conclusive of the amount of daily deposits. A bank may receive \$100,000 to-day on deposit and through collections, and may on the same day, by loans and otherwise, disburse \$105,000. Its daily balance in such case would be the same as the day before, less \$5,000; but would that be indicative, even, much less conclusive, of the amount of deposits received or of business done on that day? We have examined with much care the case of *Beard v. Independent Dist.*, 31 C. C. A. 562, 88 Fed. 375. That case arose under statutes entirely unlike those of this state. In that case the court says (page 377): "The question for decision is, what rule should be followed by a receiver of a national bank in distributing the assets of the bank, which have come into his hands under the provisions of the laws of the United States, in cases wherein it appears that trust funds have been received by the bank in the course of its business?" Such is not the question in this case. The bank of C. Bunting & Co. was not a national bank. The assets of that bank did not come into the hands of the respondent as receiver under any law of the United States. The court in the case in *Beard v. Independent Dist.*, 31 C. C. A. 562, 88 Fed. 375, seems to hold that the real point at issue in that case was, were the funds of the bank augmented by the addition thereto of the trust funds? We do not see how such a question could be raised under the proofs in this case.

We are unable to see that any different result could be reached in this case from further argument. In fact, the question in this case does not seem to be so much one of fact as the application of the law to facts about which there is no contention. Counsel for respondent contends that the deposit of the checks by Storer was not a deposit of money such as would create a trust fund on the part of the state. With this contention we cannot agree without abrogating the provisions of our statutes. The plaintiff would, we think, have been entitled, on motion, to a judgment on the pleadings in this case. The depositing of the checks by Storer is admitted by the answer, and, said checks being "public moneys" in the hands of said Storer, and,

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being by him deposited as "public moneys" in the bank of C. Bunting & Co., we are unable to see what there is to be urged against a judgment for plaintiff upon the pleadings. Rehearing denied.

Quarles, J., concurs.

SULLIVAN, J., Dissenting.—Respondent contends, in his petition for a rehearing, that the only question of law presented on appeal was: Did a trust relation arise from a deposit of money in the Bunting bank by Storer, as state treasurer, and which had come to the receiver's hands, which would allow the state to pursue and take it? It is contended that it never was claimed that a deposit by Storer's predecessor in office, Bunting, could be shown, or was shown, as a basis for recovery in this action, or that there was any admission in respondent's answer that would relieve the appellant from proving his allegations. That it appeared from the opinion of the court that an actual deposit of money belonging to the state was a necessity to the state's recovery. That as there was no proof of Storer's having made any deposit, the court then considered whether recovery could be had upon the evidence or admissions that Storer's predecessor had deposited money there. And in support of this contention quotes from the opinion the following: "The respondent insists that the motion for nonsuit was properly granted on the ground of variance between the allegation and proof. It is true that the evidence shows that some, or all, of the money in question was deposited with C. Bunting & Co., bankers, by the former treasurer, and not by the present one. In this respect the petition is defective. But such defect is cured by the allegations of the answer, wherein it is alleged that such money was placed in said bank by C. Bunting, former treasurer, who gave the check therefor to Treasurer Storer." And contends that the court misapprehended petitioner's position in this, to wit, that it is not a variance between allegation and proof, but that it is a clear failure of proof. Also contends that the court mistakes the fact when it says: "It is true that the evidence shows that some, or all, of the money in question was deposited . . . by the former treasurer, and not by the present

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one." And contends that all the testimony goes to what appears from the books only, and, on this subject, nothing of the witness' own knowledge. It is also contended that the evidence failed utterly in establishing the allegation that Storer made any deposit whatever as alleged. It is also contended that it was not shown where the money belonging to the state was deposited, and quotes the following from the testimony of the state's witness, the receiver, to wit: "Mr. Bunting gave Storer two checks, one of which was drawn on the Capital State Bank at Boise and the other on C. Bunting & Co.'s Bank at Blackfoot. These two checks represented the funds in the state treasury at that time. I know this, because I examined the state treasurer's books. I don't know where the money was that belonged to the various funds. Storer gave Bunting a receipt for the checks." It is also urged that the court evidently misapprehends the averments in the answer wherein the opinion states that the "petition is defective," but that such defect is cured by the answer, and contends that the averments in the answer do not admit that Bunting, as state treasurer, made a deposit of state funds in said bank; and quotes the following from the answer: "Said receiver denies that the said pretended or any moneys mentioned in the said petition ever were or are now credited on the books of C. Bunting & Co., bankers, defendants, or that the same were ever received by said C. Bunting & Co., bankers, with full or any notice or knowledge that the said moneys belonged to the petitioner, the state of Idaho, or that any moneys were ever deposited by him at all." "Further answering the said petition, said receiver denies that the said or any moneys whatever belonging to the state of Idaho ever came to his hands, as receiver or otherwise." "There was a credit on the books of the said defendant bank to C. Bunting, as state treasurer, of a considerable sum of money," etc., and, in folio 26, "His said predecessor gave him a check on the defendant bank for the full amount of money in his (not the bank's) hands belonging to the state," etc. And contends that said averments are all that is contained in said answer touching said subject, and that said allegations do not admit a deposit by Bunting, either directly or indirectly, by intendment

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or by fair construction; that it denies that any deposit of the state money was ever made in said bank by anybody, at any time. The point made by the foregoing is that the proof failed as to the particular thing alleged in the petition, to wit, that the deposit was made by Storer, state treasurer, and that the defect in proof was not made good by admissions in the answer. It is also contended that the court erred in remanding the case with instructions to enter judgment for the state. The appeal was from a judgment of nonsuit, granted on motion of the respondent. Said motion was made at the close of plaintiff's evidence, and before the defendant had put in any evidence whatever. It is contended that by remanding the case with instructions to enter judgment for the state the defendant is deprived of the right to make a defense on the merits and facts of the case; that such proceeding is not due process of law, and denies the defendant a substantial right—that of making his defense on the merits.

In *Bagley v. Eaton*, 10 Cal. 149, it is held as follows: "It is not our practice to direct the entry of a judgment in the court below in actions at law, except when the facts have been found by the judge who tried the cause, or by the special verdict of a jury, or when, from the character of the action or pleadings, one of the parties is entitled to judgment without proof." In *Cooper v. Shepardson*, 51 Cal. 300, the court reversed the case, but declined to order final judgment, saying: "It may be that upon a new trial a different case will be made out." Hayne, in his work on New Trial and Appeal (section 296), holds that, when all of the material facts are established in the court below, the supreme court, in reversing a judgment, may, in its discretion, direct final judgment. In the case at bar the material facts were not found by the court below. Judgment of nonsuit was entered against the plaintiff at the close of its evidence. The court found no facts upon which a judgment could be based in favor of the state; and in that case this court must find such facts in order to direct a judgment against the defendant, who is respondent here. To do so would be to exercise original, rather than appellate, jurisdiction. Of course, a different question would be presented if, under the pleadings,

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the appellant was entitled to judgment without proof; and in that case a trial court, on proper application, would allow the pleadings to be amended.

The opinion of the court is based on the ground that Bunting, Storer's predecessor, deposited state money; and that conclusion is reached by holding that the answer cures a defective allegation in the complaint. On a careful re-examination of the pleadings, I am of the opinion that the answer does not admit that the predecessor of Treasurer Storer deposited said money in said bank. The admission that said bank-books show credit to said predecessor is not such an admission as would warrant the court in finding that said Bunting did make a deposit of state money when such deposit is specifically denied by the answer. The averment is that there was a credit on the books of the defendant bank to C. Bunting, as state treasurer, of a considerable sum of money. That admission is not sufficient to hold that Bunting deposited therein over \$32,000 of the state's money, or of any amount whatever, without proof.

While it is true the evidence introduced by the state tends to show that Bunting, as state treasurer, had a credit in said bank, and of the amount thereof, the defendant had a right, under his answer, to show that said credit was a fictitious one, or that no public money had, as a matter of fact, been deposited in said bank. This is not an action between the Bunting Banking Company and the state, but against the receiver, who represents all of the creditors of said bank; and the creditors, through the receiver, have the right to make any legal defense that will defeat the state's claim.

This court has in this case only appellate jurisdiction, and, as the court below has found no facts on which a judgment can be based, this court cannot usurp the jurisdiction of the *nisi prius* court, and in the first instance find facts on which to base a judgment. I do not think the pleadings are such as would warrant a judgment on them without proof. The cause should have been remanded, and the receiver given an opportunity to present his defense.

While it is true the receiver, as a witness for the plaintiff, testified that said ledger was a book of original entry of said

Points decided.

bank, it is not shown who made said entries, or that they are correct.

The opinion of the majority of the court on the petition for a rehearing presents an additional reason for an opinion in favor of the state that was not suggested in oral argument or by brief on the hearing of the case, and that is that the checks deposited by Storer were "public money," under the provisions of section 6977 of the Revised Statutes. That point was not mooted on the hearing of this case, and it is only right and fair to the respondent that he should be heard upon points on which the decision rests. If it be said the check was public money, and must be considered such in this case, it may be that the receiver will be able to return said check—"public money"—to the plaintiff, and thus return to the state the identical "public money" deposited by Treasurer Storer; and, if the state gets the identical "public money" which it deposited by its treasurer, it ought not to complain.

The circumstances under which the case was presented to this court were most unfavorable, and the importance and far-reaching effect of the decision demand that the parties should be fully and fairly heard, and I think a rehearing should be granted.

(December 16, 1898.)

FAIRCHILD v. ADA COUNTY.

[55 Pac. 654.]

INQUEST—CORONER—PHYSICIAN.—When a physician or surgeon has been subpoenaed and ordered by a county coroner, under the provisions of section 8379 of the Revised Statutes, to inspect the body of a deceased person, and to give to the coroner's jury his professional opinion as to the cause of death, the reasonable value of his services in making the inspection is a charge against the county, under the provisions of section 2161 of the Revised Statutes, and acts amendatory thereof, defining what claims are charges against a county.

Argument for Appellant.

SAME—AUTOPSY.—If, in such case, an autopsy is necessary to ascertain the cause of death, and such autopsy is made by a physician or surgeon under the provisions of said section 8379 of the Revised Statutes, he is entitled to recover from the county the reasonable value of his services in making such *post mortem* examination.

SAME—WHAT COMPENSATION PHYSICIAN IS ENTITLED TO.—A physician or surgeon is not entitled to the compensation aforesaid on the ground that he is an expert witness, but for the work and labor necessary in the examination of the body, in order to prepare himself to give an intelligent opinion to the jury of the cause of the death of the deceased.

LIABILITY OF COUNTY—AUTHORITY OF CORONER.—The coroner is not authorized to make a contract as to the sum the county shall pay in such cases. And the board of county commissioners should only allow the reasonable value of such services.

(Syllabus by the court.)

APPEAL from District Court, Ada County.

Frank Martin, for Appellant.

Section 8384 gives to coroners the authority to issue warrants of arrest. Coroners holding inquests exercise judicial functions. The coroner's court is a court of record, of which the coroner is judge. (*People v. Devine*, 44 Cal. 458; 4 Am. & Eng. Ency. of Law, 176, and cases cited; *County of Northampton v. Innes*, 26 Pa. St. 157; *Pueblo County Commrs. v. Marshall*, 11 Colo. 84, 16 Pac. 838; *Alleghany Co. v. Shaw*, 34 Pa. St. 301; *Boislemere v. County Commrs.* 32 Mo. 375; *Kempner v. Pulaski County*, 64 Ark. 139, 41 S. W. 50.) We think that, without any statutory authorization, coroners holding inquests by reason of the judicial functions, and general powers with which they are clothed, charged to use all necessary means to determine the cause of death, have full power to employ a physician at the expense of the county, to make a *post mortem* examination, and this view, in our opinion, is supported by the weight of authority. (*County of Alleghany v. Shaw*, 34 Pa. St. 301; *St. Francis County v. Cummings*, 55 Ark. 419, 18 S. W. 461; *Dearborn Co. v. Bond*, 88 Ind. 102; *County v. Innes*, 26 Pa. St. 156; *Jameson v. Board of Commrs.*, 64 Ind. 530; *Moser v. Boone Co.*, 91 Iowa, 359, 59 N. W. 39;

Argument for Respondent.

Commonwealth v. Harman, 4 Pa. St. 269.) The principle seems well established that when there is a statute authorizing a certain service, the county is liable to pay a just compensation for that service, notwithstanding that the statute does not fix or provide the compensation. (*Ravenscraft v. Board of Commrs.*, 5 Idaho, 178, 47 Pac. 944; *People v. Supervisors of Albany*, 28 How. Pr. (N. Y.) 25; *Hull v. Washington County*, 2 Greene (Iowa), 473; *Anderson v. Shoshone County*, ante, p. 76, 53 Pac. 105.) A coroner holding an inquest has the authority to order a *post mortem* examination, at the public charge, whenever he deems it necessary, in order to ascertain the cause of death, and the physician or surgeon so employed is employed by the county, and is entitled to a reasonable compensation from the county for his services. (*Alleghany County v. Shaw*, 34 Pa. St. 302; *St. Francis County v. Cummings*, 55 Ark. 419, 18 S. W. 461; *Commissioners v. Harman*, 4 Pa. St. 269; *Boislemere v. Commissioners*, 32 Mo. 375; *Lang v. Board of Commrs. of Perry County*, 121 Ind. 134, 22 N. E. 667; *Christie v. Sonoma County*, 60 Cal. 164; *Sherman v. Supervisors*, 30 How. Pr. (N. Y.) 180; *County v. Innes*, 26 Pa. St. 156; *Kempner v. Puloski County*, 64 Ark. 139, 41 S. W. 50; *Alleghany County v. Watt*, 3 Pa. St. 462; *Dearborn County v. Bond*, 88 Ind. 102; *Gaston v. Board of Commrs.*, 3 Ind. 498; *Clark County v. Kerstan*, 60 Ark. 508, 30 S. W. 1046; *Moser v. Boone County*, 91 Iowa, 359, 59 N. W. 39; *Jameson v. County Commrs.*, 64 Ind. 524.)

R. E. McFarland, Attorney General, and E. J. Dockery, for Respondent.

It is a wise and practically universal rule that county officers cannot bind the county unless the statutes clothe them with such power. When municipal authorities of a city act under an authority derived from a statute, they must follow strictly its provisions. (*Gloss v. Ashbury*, 49 Cal. 571.) No order made by a board of supervisors is valid or binding unless authorized by law. (*Linden v. Case*, 46 Cal. 171; *People v. Supervisors of El Dorado Co.*, 11 Cal. 170; *Branch Turnpike Co. v. Supervisors of Yuba Co.*, 13 Cal. 190; *Trinity County v. McCammon*,

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25 Cal. 117; *Sutro v. Pettit*, 74 Cal. 332, 5 Am. St. Rep. 442, 16 Pac. 7.) The legislature of this or any other state of which we have any knowledge has not clothed its petty officers with the dangerous power of swamping a county with debt, and where the statute does not expressly provide for the payment of an obligation incurred by an officer, the courts will not imply the duty to pay. (*Frاندzen v. San Diego County*, 101 Cal. 317, 35 Pac. 897.)

SULLIVAN, C. J.—The appellant commenced this suit in the probate court of Ada county to recover \$125 for services rendered at the request of the coroner of said county in making an examination of the body of Philip Gregory, to ascertain the cause of death of said Gregory, and giving evidence to the coroner's jury at an inquest held by said coroner of the facts ascertained by such examination and also for performing an autopsy or *post mortem* examination on the body of one Gour, at the summons and order of said coroner, to ascertain the cause of the death of said Gour, and to give the facts found on such examination to the coroner's jury. The proper bills were made and presented to the board of commissioners of respondent county, and by said board disallowed. Thereupon this action was brought and trial had in said probate court, and judgment entered in favor of the appellant. An appeal was taken to the district court, where such appeals are tried *de novo*. The demurrer to the complaint, which was a general one, filed in the probate court, was heard by the court, and an order made overruling the same. Thereafter the cause was called for trial, when the appellant was sworn as a witness in his own behalf, and counsel for the defendant objected to any testimony that the witness might give. The grounds of the objection are not stated in the record. After argument by the respective counsel, the court directed that the order of the court theretofore made overruling the said demurrer be set aside, and an order entered sustaining said demurrer. The plaintiff declined to amend his complaint, and judgment of dismissal was entered. This appeal is from the judgment.

By sustaining the demurrer the court held that the complaint did not state a cause of action, and the only question presented

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by the record is, Is the county under legal obligation to pay for the services of a physician summoned by the county coroner to appear at an inquest and make the necessary examination for the purpose of ascertaining the cause of death, and to give to the jury his professional opinion as to the cause of the death of deceased? Sections 8377 and 8378 of the Revised Statutes provide that county coroners shall hold inquests in certain cases. Section 8379 of the Revised Statutes is as follows: "Coroners may issue subpoenas for witnesses, returnable forthwith, or at such time and place as they may appoint, which may be served by any competent person. They must summon and examine as witnesses every person who, in their opinion, or that of any of the jury, has any knowledge of the facts, and may summon a surgeon or physician to inspect the body and give a professional opinion as to the cause of the death." Section 8380 of the Revised Statutes provides that witnesses may be compelled to attend and testify in inquest cases, and may be punished by the coroner for disobedience. In holding an inquest the coroner exercises judicial functions. It is well known that, in many cases where there is cause to believe that a person has met death by criminal means, a *post mortem* examination must be held to ascertain the cause of death. And, when such examination is required, the services of a physician are worth much more than where only a mere inspection of the body is necessary. Under our statutes, in such cases, the coroner, where he has jurisdiction, may summon a physician. The statute (section 8379) declares, "to inspect the body and give a professional opinion as to the cause of the death." The question arises as to the meaning of the word "inspect," as used in said section. Webster defines it to mean "to look upon; to examine for the purpose of determining quality, detecting what is wrong, and the like; to view narrowly and critically; as to inspect conduct," etc. Evidently it was contemplated by the provisions of said section that the physician or surgeon must make such an inspection of the body as would enable him to form and give a professional opinion as to the cause of death. If such opinion could not be formed from an ocular inspection of the body, then such an inspection must be made as would enable the physi-

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cian to form an intelligent opinion as to the cause of death. If an autopsy is absolutely required for that purpose, then the inspection must go that far. The inquest is held for the purpose of ascertaining the cause of death, and to hold that the law is not broad enough for that purpose, when more than ocular inspection is required to prove that fact, would be most technical and absurd. The coroner is supposed to do his duty, and not to require an autopsy, unless there is some evidence tending to show that the death was caused by criminal means. In case of death by accident or disease, the county should not be put to the expense of an autopsy.

The cause of action stated in the first count of the complaint was for services rendered in inspecting the body of one Philip Gregory, and giving in evidence his professional opinion as to the cause of the death of the deceased. It is not shown whether the appellant was allowed the ordinary witness fees or not. He is not entitled to witness fees as an expert. For testifying he is entitled to only such fees as other witnesses. It appears that the board of county commissioners allowed him \$5 of his claim of \$25 for the inspection of said body, and if, as a matter of fact, that is all the services rendered were worth, that is all the county is liable for. It was not the intention of the law to permit the coroner to order an autopsy in every case, whether required or not, and thus create a large bill of costs against the county. It has been suggested that, if any charges are allowed in cases like that at bar, unprincipled coroners and physicians will bankrupt the counties of the state. That suggestion is of no avail, and, if that charge be true, the remedy is with the legislature. We must presume that the least officer of the county government will as faithfully keep his oath, and as conscientiously perform the duties imposed upon him by law, as the highest officer of the state. The coroner has no authority to bind the county as to what a reasonable fee shall be in such cases, and the board of county commissioners should only allow for such services their reasonable value. The judgment is reversed, and the cause remanded, with instructions to overrule the demurrer. Costs of this appeal are awarded to appellant.

Huston, J., concurs.

Argument for Appellants.

QUARLES, J., Dissenting.—I do not think that coroners are authorized by section 8379 of the Revised Statutes to employ a surgeon to perform an autopsy, and bind the county for the cost of same; and on that ground I dissent from the opinion in this case.

(December 17, 1898.)

PALMER v. PETTINGILL, ASSESSOR.

[55 Pac. 653.]

BILL OF EXCEPTIONS—SECTION 4427 OF THE REVISED STATUTES CONSTRUED.—Under the provisions of section 4427 of the Revised Statutes, 1887, an order overruling or sustaining a demurrer need not be embodied in a bill of exceptions to be reviewed on appeal. If the same appears in the records or files, it may be reviewed on appeal, as though settled in a bill of exceptions.

RECEIVER—TAXES—ASSESSMENT.—When money or property in litigation is in the hands of a receiver of the court, and is assessed to such receiver, the taxes must be paid thereon by the receiver under the direction of the court.

SALE OF PERSONAL PROPERTY IN HANDS OF RECEIVER FOR TAXES.—Personal property in the hands of such receiver is not subject to seizure and sale for the collection of the taxes thereon.

TAX LIENS.—The only tax liens in this state are those created by statute.

SAME.—Section 1413 of the Revised Statutes makes every tax due on personal property a lien upon the real property of the owner.

SAME—WHEN TAX LIEN ON PERSONAL PROPERTY.—The tax levied on personal property is not a lien thereon, at least until such property has been seized by the tax collector for the purpose of making the tax by sale of the property.

SURETIES—LIABILITY.—The sureties of an officer mentioned in section 403 of the Revised Statutes are liable to any person injured or aggrieved by a wrongful act done by the officer in his official capacity.

(Syllabus by the court.)

APPEAL from District Court, Ada County.

Hawley & Puckett, for Appellants.

We claim that a tax upon personal property is a lien upon the property assessed while it remains in the county where it is

Argument for Respondent.

assessed; that the respondent should have paid the tax under protest and then sued to recover it back; that the bondsmen are not liable for the acts of appellant Pettingill in seizing the property assessed. Revenue laws should be given a fair and liberal construction to effect the end for which they were intended. (*United States v. Hodson*, 10 Wall. 395-406; *Cliquot's Champagne*, 3 Wall. 114-144; *Cornwall v. Todd*, 38 Conn. 443-448; *State v. Taylor*, 35 N. J. L. 184-190; Endlich's Interpretation of Statutes, secs. 245-265, and cases therein cited.) We contend that should it be held that the appellant Pettingill acted illegally in seizing and selling the property, he acted in a ministerial capacity, and not judicially, and therefore his bondsmen are not liable for such acts. (*Ford v. McGregor*, 20 Nev. 446, 23 Pac. 508.)

N. M. Ruick, for Respondent.

This being an appeal from the judgment only and there being no statement or bill of exceptions in the record, the court will review such errors only as may appear from an inspection of the judgment-roll. (*McBee v. Randall*, 41 Cal. 136; *Gregory v. Nelson*, 41 Cal. 278, 282; *Emeric v. Alvarado*, 64 Cal. 529, 594, 2 Pac. 418.) At the time the assessment was made, the property was in the possession of a receiver appointed by the court, and the same was properly assessed to him. (Idaho Rev. Stats., sec. 1448.) The taxes should have been paid by the receiver under the direction of the court. (Idaho Rev. Stats., sec. 1448.) The property being in the custody of the law was not liable to seizure and sale. (25 Ency. of Law, 309; *Yuba Co. v. Adams*, 7 Cal. 35; *County etc. v. Clarke*, 36 Md. 206.) A tax is not a lien upon personal property in Idaho until actual levy and seizure. (Idaho Rev. Stats., "Liens," 1412-1414; 25 Ency. of Law, 270, 271; *McKay v. Bachellor*, 2 Colo. 593; *State v. Rowse*, 49 Mo. 586, 593; *George v. St. Louis Cable Co.*, 44 Fed. 117; *State v. Goodnow*, 80 Mo. 271, 275; *Greeley v. Provident Sav. Bank*, 98 Mo. 460, 11 S. W. Rep. 980; *Parsons v. Allison*, 5 Watts (Pa.), 72, 76; *Mooore v. Marsh*, 60 Pa. St. 46.) Property of a delinquent taxpayer cannot be seized in the hands of a *bona fide* purchaser for value, unless the tax is a lien upon it.

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(25 Ency. of Law, 308, 309; *Maist v. Bird*, 22 Fed. 180; *Moore v. Marsh*, 60 Pa. St. 46; *Jacob v. Preston*, 31 La. Ann. 517; *George v. St. Louis Cable Co.*, 44 Fed. 117; *Lammon v. Feusier*, 111 U. S. 17, 22, 4 Sup. Ct. Rep. 286; *State v. Jennings*, 4 Ohio St. 418.) The act of the defendant Pettingill in this case in seizing and selling the property of a third person constituted him a trespasser, and an action of trespass was the proper remedy. (25 Ency. of Law, 602-604; *State v. Conover*, 28 N. J. L. 224, 78 Am. Dec. 54; *Pike v. Colvin*, 67 Ill. 227; *Boulware v. Craddick*, 30 Cal. 190; *Markley v. Rand*, 12 Cal. 267; *Yarborough v. Harper*, 25 Miss. 112; *Weston v. Dorr*, 25 Me. 176, 43 Am. Dec. 259; *Weber v. Henry*, 16 Mich. 399.) The measure of damages in such case, where no wrongful or malicious intent is shown is the value of the property. (*Dorsey v. Manlove*, 14 Cal. 553; *Phelps v. Owen*, 11 Cal. 22.)

SULLIVAN, C. J.—This is an action for damages against the assessor, *ex-officio* tax collector, of Ada county, and his bondsmen, for the seizure and sale of certain personal property, consisting of a stock of merchandise, for taxes for the year 1897. The property originally belonged to the Hickok Mercantile Company, Limited. On the application of certain creditors of said corporation, the district court in and for said county appointed F. C. Ramsey, as receiver. He qualified and took possession of said property on the eleventh day of May, 1897. On the seventeenth day of May, 1897, the said assessor assessed said property to the Hickok Mercantile Company, Limited; F. C. Ramsey, receiver. The said receiver continued in the possession thereof, selling and disposing of the same under the order of said court, until about the 20th of August, 1897, when said court ordered said receiver to, on the 1st of September, 1897, sell whatever remained of said stock of goods and book accounts to the highest bidder for cash. And such proceedings were had under said order of sale that the plaintiff, who is respondent here, became the purchaser of what remained of said stock of goods, book accounts, etc., and took possession thereof. It appears that the said receiver had sold about two-thirds of said stock of goods after said assessment was made, and prior to the sale of said goods and merchandise to the respondent as

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above set forth. On the fifteenth day of December, 1897, the said assessor seized the goods so sold to the respondent, and took them from him, claiming to act under and by virtue of the assessment aforesaid, and the law in such cases made and provided, and sold and disposed of a sufficient portion of said goods to pay the amount of the taxes claimed to be due under the assessment aforesaid. The damages claimed are the value of the property taken and sold, alleged to have been \$323.32, and fifteen dollars for storage. The cause was tried by the court without a jury, and the court made its findings of fact and conclusions of law, and entered judgment in favor of the respondent for \$263.32 damages and costs.

The appeal is from the judgment on the judgment-roll, which contains no bill of exceptions. Counsel for respondent contends that all of the points relied on by the appellants arose on demurrer, and that the order overruling the demurrer should have been brought here by bill of exceptions or statement, and cannot be heard in the court for that reason, and cites *Berry v. Alturas Co.*, 2 Idaho, 296, 13 Pac. 233. That decision was rendered by the territorial supreme court in February, 1887, under section 403 of the Code of Civil Procedure of 1881. That section was amended subsequent to the rendition of said decision, and is now section 4427 of the Revised Statutes of 1887, which went into effect June 1st of that year. The amendment provides, among other things, that an order sustaining or overruling a demurrer need not be embodied in a bill of exceptions, but the same, appearing in the records or files, may be reviewed upon appeal as though settled in a bill of exceptions. Said amendment does away with respondent's contention.

Counsel for appellants contend that a tax on personal property is a lien upon such property while it remains in the county where it is assessed. In other words, were the taxes so assessed a lien upon the property to the extent that the assessor could seize and sell it, so long as it was in the county where assessed, although it had passed into the hands of an innocent purchaser for a valuable consideration? When such property was assessed, it was in the hands of F. C. Ramsey, receiver, and assessed to the "Hickok Mercantile Company, Limited; F. C.

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Ramsey, receiver"—and properly so, under the provisions of section 1448 of the Revised Statutes, which is as follows: "Money and property in litigation in possession of a county treasurer, of a court, clerk or receiver must be assessed to such treasurer, clerk or receiver and the taxes paid thereon under the direction of the court." Said property was assessed on the seventeenth day of May, 1897, and was then in the hands of the receiver, and remained in his hands (except such as he sold under the direction of the court) until the sixth day of September, 1897, when what remained of said original property and stock of merchandise was sold by said receiver to the plaintiff. Under the provisions of said section 1448, *supra*, it was the duty of said receiver to pay said taxes under the order of the court. At the time the property was assessed, it was in the custody of the law, and was not liable to seizure and sale for the taxes. The court having possession of said property ought to have directed the receiver to pay the taxes.

Recurring to the exact point under consideration, and that is whether said tax was a lien on said property, we are clearly of the opinion it was not. The tax lien in this state owes its existence wholly to the provision of our statutes. Section 1412 of the Revised Statutes is as follows: "Every tax has the effect of a judgment against the person and every lien created by this title has the force and effect of an execution duly levied against all of the property of the delinquent; the judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof." Section 1413: "Every tax due upon personal property is a lien upon the real property of the owner thereof from and after the second Monday in April in each year." Section 1414: "Every tax due upon real property is a lien against the property assessed; and every tax due upon improvements upon real estate assessed to others than the owner of the real estate, is a lien upon the land and improvements, which several liens attach as of the second Monday of April in each year." Said section 1412 declares that "every lien created by this title [title 10 of the Revised Statutes] has the force," etc. Then section 1413 declares that every tax due upon personal property is a lien upon the real property of

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the owner, and section 1414 makes every tax due on real estate a lien on such real estate. Nowhere is it declared that the tax due on personal property is a lien on such property. Section 1560 of the Revised Statutes provides that at any time after personal property is assessed the tax collector may at any time collect the tax (except where real estate is liable therefor) by seizure and sale of any personal property owned by the delinquent. But that section creates no lien on the personal property assessed, or other personal property of the delinquent—at least, until after seizure by the collector. Tax collectors are thus given ample power to collect taxes on personal property by seizure and sale of any personal property owned by the delinquent. But until the seizure is made the statute creates no lien on the personal property taxed, or on any other personal property owned by the delinquent. To the effect that a tax is not a lien on personal property until actual seizure thereof, see 25 Am. & Eng. Ency. of Law, 270, 271; *McKay v. Batchellor*, 2 Colo. 591.

It is contended that if the appellant Pettingill acted illegally in seizing and selling said property, he acted in a ministerial capacity, and not judicially, and for that reason his bondsmen are not liable for such acts. In the seizure and sale of said property it is conceded that he acted in the utmost good faith, and the record shows that he acted officially. Under the provisions of section 403 of the Revised Statutes, his sureties are liable to any person injured or aggrieved by the wrongful act done in his official capacity. The court that appointed said receiver ought, if possible, to reimburse the tax collector for the actual amount of taxes that he turned into the county treasury, collected on said property, out of any funds that may be under the control of said court, belonging to said Hickok Mercantile Company; for, if proper application had been made to the court, it would have directed the receiver to pay said taxes as required by the provisions of said section 1448, and the tax collector and his sureties would have escaped the loss and vexation of this suit. The judgment of the court below is affirmed, and costs awarded to the respondent.

Huston, J., and Quarles, J., concur.

Argument for Appellant.

(December 28, 1898.)

BRYAN v. MONTANDON.

[55 Pac. 650.]

TRANSFER OF STOCK—DURESS—BONA FIDE HOLDER.—The transfer of stock by a married woman, although procured by duress and coercion on the part of her husband, is good under the statutes of Idaho, where the transferee is a *bona fide* holder for value without notice or knowledge of such duress or coercion.

(Syllabus by the court.)

APPEAL from District Court, Blaine County.

A. F. Montandon, for Appellant.

Respondent could have anticipated the pledge, since the duress ceased, by telegraphing McCornick of the duress. She did nothing; thereby she exercised her option in favor of McCornick, and unless McCornick had actual notice of the duress or fraud, he took a good pledge, if on the faith of it he parted with value. The complaint fails to charge McCornick with notice, and shows he parted with value. McCornick obtained a good and valid pledge, and when she says she made no effort at any time between the time when the duress ended and July 28, 1896, a period of over twenty months, the conclusion is irresistible that McCornick had a perfect pledge. Our code seems to cover the whole ground as to him. (Section 3023 says, title 6, chapter 5, "Unlawful Transfers"; section 3414, title 12, chapter 5, "Pledge"; Clark on Contracts, 363, 770; Norton on Bills and Notes, 248, 249; Newmark on Sales, secs. 197-205; *Deputy v. Stapleford*, 19 Cal. 302; *Connecticut L. Ins. Co. v. McCormick*, 45 Cal. 580; *Muir v. Jones*, 28 Or. 646, 31 Pac. 646; *Gruber v. Baker*, 20 Nev. 453, 23 Pac. 858; *Brazton v. Bell*, 92 Va. 229, 23 S. E. 289; *Ross v. Richolson*, 3 Kan. Ap. 239, 45 Pac. 97; *Dunn v. Dunn*, 114 Cal. 210, 64 Pac. 5.)

Lyttleton Price and Texas Angel, for Respondent.

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A married woman cannot dispose of her separate property without certain formalities which were omitted in this case. It is true that transfer of corporate stock is excepted from this general provision of statute, but it appears that here there was no transfer, nor was there, indeed, any disposition of the stock made by the wife at all. It was her separate property. She had no voice in its disposal. Her husband used it for his own purposes and if it be said to be with her consent, extorted from her under duress, it was not with the formality provided by law for her protection. (Idaho Rev. Stats., sec. 2498; *Dernham v. Rowley*, 4 Idaho, 753, 44 Pac. 643.)

HUSTON, J.—The plaintiff, wife of George V. Bryan, brings this action to recover one thousand shares of stock of the G. V. B. Mining Company, a corporation existing under the laws of the state of New York. The facts as they appear in the record are substantially as follows: That from about May 18, 1894, to the 25th of October, 1894, the plaintiff was holder and owner of said stock. At said last-mentioned date the husband of plaintiff, and one John Bryan, his brother, and G. W. Venable, an uncle of said George V. Bryan, were engaged in working and operating certain mines in Owyhee county, in this state. That at about said last-mentioned date the exigency of their said business or operations required them to raise a certain amount of money. In the negotiating of a loan thereof, it became necessary to put up collaterals as security for such loan; and to this end the plaintiff's said husband, George V. Bryan, demanded of her that she deliver to him said one thousand shares of stock of the said G. V. B. Mining Company, so as aforesaid held and owned by her, to be used by her said husband and his said copartners as collateral in the procuring of said loan, which the plaintiff refused to do. Plaintiff alleges that upon such refusal by her the said G. W. Venable, together with her said husband and his said brother, "commenced a campaign of persecution against plaintiff, to force her to give up to them the said stock, and other property she had"; that

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these persecutions drove the plaintiff to distraction, overcame her judgment, utterly destroyed all influence she had with her husband, and temporarily separated him from her, broke down her health, and resulted in so weakening her in health and in mind that in spite of her unwillingness, and against her objections and protests, they took the said stock from her, and pledged the same to McCornick & Co., of Salt Lake City, Utah, as security for the payment of a loan to them of \$10,000. It is unnecessary to go into the details of the method by which the plaintiff was induced to give up to her husband the said stock. They reflect but little credit upon any of the parties engaged therein. The said shares of stock in the G. V. B. Mining Company, so procured from the plaintiff, together with other stocks, were by said George V. Bryan and G. W. Venable pledged to McCornick & Co., of Salt Lake City, as security for a loan of \$10,000, evidenced by the promissory note of the said George V. Bryan and G. W. Venable. It does not appear that the defendant had anything to do with, or was in any way cognizant of, the chivalrous manner in which the said stock was procured from the plaintiff. The said note of George V. Bryan and G. W. Venable not being paid at maturity, it was renewed from time to time until January 6, 1896, when a note for the sum due thereon (there having been some payments of interest) was given, payable on demand. Some time in June, 1896, the said G. W. Venable came to the defendant, who was, and for some time prior to said date had been, the attorney of said Venable, and stated to him that G. V. Bryan and himself owed a note to McCornick & Co., of Salt Lake City, secured by fifteen hundred shares of G. V. B. Mining Company stock, one hundred shares of Bryan-Marsh Company stock, and ten thousand shares of Idaho Electric Supply Company stock; calling it Bryan's stock. He further said said note was long past due, and McCornick was pressing for payment; that if defendant would take up said note, and thereby prevent the sacrifice of said collaterals, he (said Venable) would additionally secure him by \$8,000 Bryan-Marsh Company notes, and a claim he had against Bryan for \$26,000. Said Venable

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wished defendant to carry the note for six months longer. Venable offered the defendant, besides the security, one per cent per month on the money—the same rate paid to McCornick & Co.—and, if any dividends were paid by the Red Elephant Mine or Electric Supply Company, also one-half of such dividends, the other half to go toward paying the note. Defendant closed with offer of Venable, and on the 20th of June, 1896, went to Salt Lake City, and on the 22d of June, 1896, took up the said note and the security deposited with said McCornick. Upon his return home from Salt Lake City, defendant called upon Venable for additional security which he had been promised; but after repeated demands, and failing to get any additional security, except from \$2,000 to \$3,000 of Bryan-Marsh Company notes, and learning that the Red Elephant mine was not near out of debt, as he had been led to believe, and becoming uneasy, he made inquiry in regard to the other securities, from which inquiries he ascertained that the Electric Supply Company stock had been attached and sold on execution upon a judgment recovered against said G. V. Bryan. It was understood and agreed between defendant and Venable, prior to the taking up of the Bryan and Venable note by defendant, that whenever defendant deemed himself insecure, he might sell said securities and reimburse himself. Deeming himself insecure, the defendant proceeded, after giving due notice, to sell the said stocks so as aforesaid given as security for said Bryan and Venable note at public auction, when the writ in this action was served upon him. The case was tried before the district court with a jury. The jury made special findings, among which were the following: 1. That the stock certificate of G. V. B. Mining Company (No. 48), for one thousand shares, was obtained from the plaintiff by duress or coercion, and against the will of plaintiff; 2. There was a conspiracy between the defendant and G. W. Venable to secure the plaintiff's stock for the benefit of either, or both of them, without paying her therefor; 3. That duress or undue influence or other unlawful means, were used by the husband of the plaintiff, or G. W. Venable or John Bryan, to induce plaintiff to give up the certificate of stock in the

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G. V. B. Mining Company for the purpose of being pledged or used to procure a loan for the benefit of the Tip Top Mining Company; 4. That such unlawful means were employed by G. V. Bryan, G. W. Venable, John Bryan, and S. B. Kingsbury; 5. That McCornick & Co., bankers, had no knowledge or notice that the said mining stock had been procured of plaintiff by duress or any other improper or unlawful means, at the time the said stock was pledged to them; 6. That said McCornick & Co. had notice that the original owner of said stock was a married woman at the time they received said stock as a security for a loan; 7. That McCornick & Co. retained said stock in their possession about twenty months; 8. That plaintiff never notified McCornick that she was the owner of said stock, or claimed any interest therein, or that said stock had been procured of her by duress, or any other unlawful means; 9. That defendant at the time he purchased said stock of McCornick & Co. had no knowledge or notice that the same was procured of plaintiff by duress, or any other unlawful means; 10. That defendant at the time he received said stock from McCornick & Co. knew that the stock in question belonged to, or was claimed by, a married woman. The court, after making some additional findings, to the effect that a conspiracy existed between G. W. Venable and the defendant to cheat the plaintiff out of the said stock, that the defendant is an attorney and counselor at law of said court, and that he bought said promissory note with intent to bring suit thereon, finds as matter of law that the plaintiff is the owner of, and entitled to the possession of, said shares of stock, and enters decree accordingly. From such decree, and from the order denying a new trial, this appeal is taken.

In reviewing the record in this case, we must say, *in limine*, that the methods and proceedings by which the transfer of the stock in question of the plaintiff to her husband was procured were iniquitous; and we think it is logically inferable from the record that the result of the trial was largely attributable to the effort to connect the defendant therewith, through and by reason of his relations with G. W. Venable. The jury found in answer to: "Question 9. Did defendant, at

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the time he purchased said stock of McCornick & Co., have knowledge or notice that the same was procured of plaintiff by duress or any other unlawful means? Answer 9. No." The jury find in their answer to question 2 that there was a conspiracy between defendant and G. W. Venable to secure the plaintiff's stock for the benefit of either or both of them without paying her therefor, but there is no evidence in the record supporting or warranting that finding. The speculations and assumptions of counsel as to the purpose and motive actuating the defendant ought not to, and cannot, be made the predicate of legal conclusions, when unsupported by the evidence. We are unable, from a very careful and critical examination of the record to find any act of the defendant which is logically or legally deserving of censure. At the earnest solicitation of his friend and client, he advanced his money to protect that friend and client, as well as his partner, from apprehended loss and disaster. That he expected to be reimbursed for his advances is presumable, and entirely in accord with every principle of honesty and fair dealing. He did nothing, so far as the record shows, that was in the slightest degree reprehensible. That he was unfortunate in getting mixed up in such a miserable domestic broil as is developed by the record in this case is no doubt regretted more heartily by him than anyone else.

We cannot agree with counsel that the statements of the defendant make him obnoxious to the provisions of section 6524 of the Revised Statutes. As before stated, defendant purchased the note and securities at the request of one of the makers of the note, and upon the agreement of such maker to fully reimburse him for the money advanced. The argument of counsel based upon his construction of section 6524 of the Revised Statutes, would preclude the defendant, upon the failure of Venable to keep his agreements, from any remedy or relief whatever. Such a position we do not think tenable. The ninth finding of the court is not warranted by the evidence.

Counsel for respondent assumes that, because the certificate of stock was procured from plaintiff by coercion and duress, inflicted by her husband and those interested and associated with him, therefore the defendant, a bona fide purchaser for

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value, without notice, nearly two years after plaintiff had transferred the stock, took no title thereto. A sufficient answer to that position is found in the provisions of our Revised Statutes, viz.: Section 2612 of the Revised Statutes of Idaho is as follows: "Shares of stock in corporations, held or owned by a married woman, may be transferred by her, her agent or attorney without the signature of her husband, in the same manner as if such married woman were a *feme sole*. All dividends payable upon any shares of stock of a corporation held by a married woman may be paid to such married woman, her agent or attorney, in the same manner as if she were unmarried, and it is not necessary for her husband to join in a receipt therefor; and any proxy or power given by a married woman touching any shares of stock of any corporation owned by her, is valid and binding without the signature of her husband, the same as if she were unmarried." Section 3023 of the Revised Statutes, under title "Unlawful Transfers," is as follows: "The provisions of this chapter do not in any manner affect or impair the title of a purchaser for a valuable consideration, unless it appears that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor." Section 3414 of the Revised Statutes, under title "Pledge," is as follows: "One who has allowed another to assume the apparent ownership of property for the purpose of making any transfer of it, cannot set up his own title to defeat a pledge of the property made by the other, to a pledgee who received the property in good faith, in the ordinary course of business and for value." The judgment and decree of the district court are reversed, and the cause remanded. Costs to appellant.

Sullivan, C. J., and Quarles, J., concur.

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(December 28, 1898.)

THUM, RECEIVER, v. PYKE, RECEIVER, AND OGDEN SAVINGS BANK, INTERVENER.

[55 Pac. 864.]

NOTICE BY TELEGRAM—MISTAKE IN SAME—VACATING JUDGMENT.—A mistake in the transmission of a telegram by the judge of the court for which the party is in no way responsible, and whereby a party is deprived of a hearing upon the trial of a cause, is sufficient ground for vacating a judgment.

(Syllabus by the court.)

APPEAL from District Court, Bingham County.

Lyttleton Price, for Appellant, cites no authorities on point decided.

E. E. Chalmers, for Defendant Pyke, files no brief.

David Evans, for Intervener.

This appeal is not taken from a final judgment, nor is it authorized by any of the subdivisions of section 4807 of the Revised Statutes of Idaho, as amended by the Session Laws of 1895, page 142, and should therefore be dismissed. (*Thomas v. Thomas*, 10 Colo. App. 170, 50 Pac. 211; *Eastman v. Gurrey*, 14 Utah, 169, 46 Pac. 828; *Thiessen v. Riggs*, 5 Idaho, 21, 46 Pac. 829; *Reitmeir v. Siegmund*, 13 Wash. 624, 43 Pac. 878; *Gray v. Haish*, 2 Kan. App. 145, 43 Pac. 293.)

HUSTON, J.—The plaintiff, as receiver of C. Bunting & Co., bankers, brings this action against the defendant, F. A. Pyke, receiver of C. Bunting & Co., merchants, and the Ogden Savings Bank intervenes. All of these parties are corporations organized under the laws of Utah, the first two doing business in Idaho, and having their principal place of business in Blackfoot, in the county of Bingham, in the state of Idaho, and the last doing business in Ogden, Utah. Some time in the month of February, 1897, in a suit or suits pending in the district court for Bingham county against said banking and mer-

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cantile corporations, receivers were appointed by said court for both said corporations. The receiver of the mercantile corporation has paid, liquidated, and discharged all claims of every kind whatsoever against the said Bunting & Co., merchants, and has asked for his discharge. The plaintiff, receiver of the said Bunting & Co., bankers, brings this suit, alleging that "the said banking corporation is the owner of, and there has come into the hands of the plaintiff as such receiver, all of the shares of said corporation C. Bunting & Co., merchants, except such part thereof as the said banking corporation had, before the appointment of this plaintiff as receiver, pledged to other persons," and "that as such receiver this plaintiff is entitled to receive and take all of the assets of every kind and character whatsoever of C. Bunting & Co., merchants. Pyke, receiver of C. Bunting & Co., merchants, makes no defense. The Ogden Savings Bank, having obtained leave of the court therefor, files its complaint and answer in intervention, wherein it alleges that it "is the owner, in the possession, and entitled to the possession of five hundred shares of the capital stock of C. Bunting & Co., merchants, being two-thirds of the entire capital stock of said corporation, there being but seven hundred and fifty shares of said stock only." The intervener then proceeds to set forth the manner in which it became the owner and possessed of said shares of stock, which is, in substance, as follows: That on or about the first day of February, 1897, and prior to the appointment of plaintiff as receiver as aforesaid, the said banking corporation of C. Bunting & Co. executed and delivered its promissory note in favor of said intervener for the sum of \$15,000 principal, payable sixty days after date, bearing interest at the rate of ten per cent per annum, which said note provided for an attorney's fee of ten per cent in case suit should be brought for the collection thereof, and which said note was made payable at Ogden City, state of Utah. On or about the 1st of April, 1897, suit was instituted by the intervener in the district court for Weber county, Utah, for the collection of said note, and due service was had upon the proper officer of said C. Bunting & Co., bankers, and thereupon a writ of attachment duly issued out of said court in said suit, under which said five

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hundred shares of the capital stock of said corporation of C. Bunting & Co., merchants, belonging to C. Bunting & Co., bankers, which was then and there in Salt Lake City, Utah, in the hands of W. S. McCornick & Co., bankers, who held the same as the stock of C. Bunting & Co., bankers, as pledged for the payment of a balance of about \$7,000 due on eight promissory notes, which said notes were made by C. Bunting & Co., bankers, in favor of said McCornick & Co., aforesaid; that judgment was recovered by said intervener upon said note and against said C. Bunting Co., bankers, for the sum of \$16,812.50 and costs; that execution was issued thereon, and said shares of stock were sold thereunder to the judgment creditor in said suit, it being the highest bidder therefor at said sale, and that on the same day of said sale, for a valuable consideration to them paid by said intervener, the said McCornick & Co. duly assigned, set over, and delivered said five hundred shares of said stock to the intervener. Intervener prays that plaintiff take nothing by his said suit; that the plaintiff be, by order of the court, required to turn over to the intervener two-thirds of all money which he has in his possession, derived from the sale of property of C. Bunting & Co., merchants; and that said receiver be required to turn over all of the assets in his hands belonging to the said C. Bunting & Co., merchants; and that plaintiff and defendant be both required to account to intervener for two-thirds of the money and other assets of said C. Bunting & Co., merchants, and for general relief. On the 28th of September, 1897, being a day of said court, plaintiff's counsel moved the court to strike from the files the order permitting intervention in said action, together with the complaint in intervention filed therein, which motion was allowed by the court; and thereupon, and upon said last-mentioned day, the court proceeded to hear said cause, there being no appearance by said intervener at said hearing; and thereafter, and on said 28th of September, the said court entered judgment to the effect that the plaintiff do have and recover from the defendant all the residue of the property and estate of C. Bunting & Co., merchants; that said plaintiff shall, however, keep separate account of the same, and of all his dealings therewith, and not mix or mingle any of such property, or moneys he may realize therefor, with the property or moneys

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now in, or that may come to, his hands as receiver of C. Bunting & Co., bankers. On the 7th of October, 1897, the intervener served notice of motion to set aside and vacate said judgment, and the order of the court striking out the complaint and answer of intervener. Upon the hearing of said motion it was made to appear that on September 24, 1897, the judge of said district court sent a telegram to the attorneys for intervener informing them that said cause would be set for hearing on "Tuesday next," but an error occurred in the transmission of said telegram, whereby the same was made to read, "Thum against Pyke will be set for Thursday next." It appearing to the court that the said intervener had, by reason of a mistake in the transmission of said telegram, for which he was in no way responsible, been prevented from having a hearing in said case, an order was made by the court vacating and setting aside both the judgment and the order striking the complaint and answer of the intervener from the files, and it is from such order that this appeal is taken. Leave was granted by the court to intervener to file an amended complaint, but that cuts no figure in this case, having been made after the order appealed from.

It is objected by the intervener (respondent) that the said order of the district court, vacating the judgment and reinstating intervener's complaint and answer, is not appealable. The order vacating the judgment was an order granting a new trial to all intents and purposes, and as such was, we think, appealable. The only question before us which we deem it necessary to pass upon at this time was the action of the district court in granting the motion to vacate the judgment and reinstate the complaint and answer of intervener. We find no error in this action of the court. It was a matter of discretion with the court, and, under the showing made in the record, we think that there was no abuse of discretion. The order appealed from is affirmed, and the cause remanded to the district court for further proceedings in accordance with law.

Sullivan, C. J., concurs.

QUARLES, J.—I concur in the conclusion reached. I think, however, that, as the cause must go back to the district court

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for trial, this court should pass upon all of the questions raised by the pleadings. In my opinion, the record raises a number of questions. For instance: Does plaintiff's complaint state a cause of action? Can the plaintiff maintain this action to recover from the receiver of the mercantile corporation the property and assets of the latter by virtue of the fact that he, as receiver of the banking corporation, holds stock in said mercantile corporation? Can the intervener recover two-thirds of the assets of the mercantile corporation by virtue of its owning two-thirds of the capital stock in such corporation? Can the assets of the mercantile corporation be distributed among its stockholders prior to its dissolution? If the proceedings in the suit brought by the Ogden Savings Bank against C. Bunting & Co., bankers, in Utah, wherein the plaintiff attached in Utah five hundred shares of stock owned in the mercantile corporation by the banking corporation, were regular, and the judgment therein valid in Utah, is not such judgment and the execution sale thereunder valid elsewhere? If the execution sale at which the intervener purchased in Utah is regular, and binding against the banking corporation and its receiver in Utah, is it not the duty of the courts of this state to give full faith and credit to said judicial proceedings in the state of Utah, under the provisions of the federal constitution? In my opinion, the above questions should be determined by this court on the record before us, so as to enable the lower court to correctly determine the merits of this action without loss of time, and on the further ground of avoiding other appeals in this action. My associates do not agree with me, and, possibly, they are correct in their view.

Argument for Respondent.

(December 29, 1898.)

PETERS v. LEFLANG.

[55 Pac. 857.]

SPECIAL FINDINGS OF JURY—VERDICT.—In an action to abate a nuisance, where special findings are made by the jury, they do not become the verdict in the case, as that term is used in section 4912 of the Revised Statutes, as amended by the act of 1885, until they are adopted by the court.

FILING MEMORANDUM OF COSTS.—A memorandum of costs in such a case is filed and served in time, if done within five days after the court has announced that it accepts and adopts the findings of the jury.

(Syllabus by the court.)

APPEAL from District Court, Blaine County.

R. F. Buller, for Appellants.

In a suit brought to recover a statutory penalty the parties, or either of them, have an absolute right to a trial by jury. (*Stevens v. Home Sav. Assn.*, 5 Idaho, 739, 51 Pac. 779-781, *Stufflebeam v. Montgomery*, 26 Idaho, 125, 26 Pac. 125.) The party in whose favor judgment is rendered must within five days after the verdict, or notice of the decision of the court or referee, file with the clerk of the court and serve upon the adverse party or his attorney a copy of the memorandum of his costs. (Sess. Acts 1895, p. 7, sec. 4912.) Where a special verdict is rendered, if the case is reserved for argument or further consideration there must be an order reversing it. (Rev. Stats., secs. 4400-4396, 4397.)

Angel & Angel, for Respondent.

This action was for the purpose of removing obstructions in the highway, and was an action in equity; and the verdict of the jury was only advisory to the court, and the cost-bill was filed and served as soon as the court made its decision adopting the findings of the jury, and was in time. (*Learned v. Castle*, 67 Cal. 41, 7 Pac. 34; *Courtwright v. Bear River etc. M. Co.*, 30

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Cal. 573.) Prior to the time of the court's making its decision, the filing of a cost-bill would have been premature, and the party filing might have been the losing party if the court saw fit to reject the findings of the jury. (See *Sullivan v. Royer*, 72 Cal. 248, 1 Am. St. Rep. 51, 13 Pac. 655.)

HUSTON, J.—The plaintiff, as road overseer, sued the defendants to abate a nuisance created and maintained by defendants in the erection and maintenance of a fence upon and across the public highway within the road district of the plaintiff. Plaintiff, in his complaint, prays for a judgment abating the nuisance, and also for the statutory penalty of ten dollars per day, during its continuance after notice. Defendants, answering, denied all the allegations of the complaint. The case was tried before the court with a jury, and on the 26th of June, 1897, the jury returned a special verdict, all of the findings thereof being in favor of the plaintiff. On the 16th of July, 1897, the court announced from the bench that it adopted the verdict of the jury as its findings, and on the 19th of July, 1897, rendered judgment that the defendants remove the said obstructions from the highway forthwith, and that the plaintiff recover his costs. On the seventeenth day of July, 1897, the plaintiff filed and served upon defendants' attorney of record his duly verified memorandum of costs and disbursements in said cause, as required by section 4912 of the Revised Statutes as amended by act of 1895, which is as follows: "The party in whose favor the judgment is rendered and who claims his costs, must, within five days after the verdict or notice of the decision of the court or referee, file with the clerk, and serve upon the adverse party or his attorney, a copy of a memorandum of the items of his costs and necessary disbursements in the action or proceeding, which memorandum must be verified by the oath of the party or his attorney or agent, or by the clerk of his attorney, stating that to the best of his knowledge and belief, the items are correct and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may, within five days after the service upon him of the copy of the memorandum, file and serve upon the adverse party or his attorney a notice of a motion to have the same taxed

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by the court in which the judgment was rendered, or by the judge thereof at chambers." On July 22, 1897, defendants filed motion to quash said cost-bill, for the reason that the same was not filed and served within the time prescribed by section 4912 of the Revised Statutes. On the twenty-eighth day of December, 1897, said motion was argued, and on the same day overruled by the court. This appeal is from the judgment, and from the order overruling the defendants' motion to quash.

Counsel for appellants contends that, as the special verdict or findings of the jury were rendered on the 26th of June, the time within which plaintiff must file and serve his memorandum of costs and disbursements commenced to run from that day. Counsel insists that "a verdict is a verdict," and perhaps, as an abstract proposition, its verity may be conceded. But in this case the verdict was merely advisory. The court, it seems, treated this case as a suit in equity for the abatement of a nuisance, and quite properly, we think. The fact that the complaint asked for damages under the statutes does not, in our view, necessarily change the character of the action. The "findings of the jury," as they are denominated in the record, did not become the verdict in the case, in the sense that term is used in section 4912, until they had been adopted by the court. Suppose the court, upon consideration (and it took twenty days to come to a determination), had concluded to set aside the findings of the jury, make findings of its own, and rendered a judgment in favor of the defendants; in what position would the defendants have found themselves with regard to their costs, if their construction of the statute is to obtain? We do not think the contention of appellants is maintainable. The judgment of the district court is affirmed, with costs to respondent.

Sullivan, C. J., and Quarles, J., concur.

Argument for Respondent.

(December 30, 1898.)

STATE v. STEVENSON.

[55 Pac. 886.]

ESTATE OF DECEDENT—NONRESIDENT FOREIGNERS.—A nonresident foreigner cannot take real estate by succession under the provisions of section 5715 of the Revised Statutes, unless he appears and claims succession within five years after the death of decedent.

RIGHT OF SUCCESSION.—If succession is not claimed within said period of time, real estate owned by deceased escheats to the state to be disposed of as provided by section 5716 of the Revised Statutes.

ESCHEAT.—Title by escheat passes to the state by operation of law.

TAXES—STATE EXEMPT.—Lands belonging to the state are exempt from taxation, and no title can be acquired to the same by a tax deed.
(Syllabus by the court.)

APPEAL from District Court, Ada County.

Wyman & Wyman, for Appellants.

The claim of title of the state is based upon chapter 14, title 10, of the Revised Statutes of Idaho, embracing sections 5700-5717, being the chapter entitled "Succession," which provides for the distribution of the property of persons dying intestate. That this estate was subject to the ordinary laws for the collection of taxes, and that no escheat could take place until five years after the reducing of the property to the possession of the state in pursuance to the order of the court, we think is fully sustained by the following case: *People v. Roach*, 76 Cal. 294, 18 Pac. 407.

R. E. McFarland, Attorney General, and Hawley & Puckett, for Respondent.

As between the state and a third party, its title to the premises in dispute is absolute, and cannot be questioned or put in issue in this case. Counsel, in support of their contention, cites but one case (*People v. Roach*, 76 Cal. 294, 18 Pac. 407), which we think confirms our contention herein. In that case the attorney general commenced proceedings before the expiration of five years, and the court held, and properly, too, that

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the action was premature. We contend that the court was justified in granting plaintiff's motion for judgment on the pleadings, for the reason that the record shows that if the state was not the owner of the property at the time of the assessment for taxes in 1893, and upon which appellant bases his title, the assessment is absolutely void for the reason that it was not assessed to the rightful owner, as required by statute. It is the duty of the assessor to assess the property to owner if he can ascertain owner; otherwise to assess it to unknown owners. (*Weyse v. Crawford*, 85 Cal. 196, 24 Pac. 735.) An assessment for taxes must be made against the owner when known. The individual, not the property, pays the tax. (*Kelsey v. Abbott*, 13 Cal. 609, and numerous cases therein cited.) A tax deed based upon an assessment of land not made to true owner, but to a person who had no title thereto, is void. (*Klumpke v. Baker*, 68 Cal. 559, 10 Pac. 197.) An assessment of lands owned by one "Costro" to "Castero" is invalid. (*Emeric v. Alvarado*, 90 Cal. 444, 27 Pac. 356.)

SULLIVAN, C. J.—This is an action in ejectment, brought by the state, against David O. Stevenson, C. C. Stevenson, and Henry Haming, to recover the possession of lot 2 and southeast quarter of northwest quarter, section 7, township 4 north, range 1 east, Boise meridian. The defendants David O. Stevenson and Henry Haming filed disclaimers, and defendant C. C. Stevenson answered, claiming to be the owner of said premises; that he acquired title to said premises under and by virtue of a certain tax deed. The following facts appear from the record: That one Adolph Hempel died on or about the sixteenth day of April, 1887, seised in fee of said tract of land, leaving no known heir surviving him; that letters of administration were duly issued to the public administrator of Ada county upon the estate of said deceased, and said estate duly administered; and on the sixteenth day of January, 1889, said administrator made his final report therein, which was allowed and approved. It appears that, when said final report was approved, said administrator had in his hands \$6,093.34 in cash belonging to said estate, the lands above described, and certain certificates of water stock; that said cash was turned into the state treasury, and

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the administrator discharged. It also appears that said deceased was a foreigner, and that no heirs or claimants have appeared and claimed said estate, or any part of it. It also appears from the answer of the defendant that said real estate was assessed for county and state purposes in the year 1893, and, the taxes not having been paid, became delinquent; that said real estate was sold by the tax collector to one F. S. Shirley, for the sum of fifty-one dollars and fifty cents, and thereafter the tax collector conveyed, by tax deed, said premises to said Shirley; that said Shirley thereafter sold and conveyed said premises to the defendant C. C. Stevenson. Said defendant also alleges that he has, in good faith, made valuable improvements upon said premises, to the amount of ninety-five dollars. He also avers that said Hempel died leaving a sister surviving him, residing in Vienna, Austria, whose name was unknown to defendant. The issues being thus made, counsel for the state moved for judgment on the pleadings, which motion was granted, and judgment entered against the defendant. The appeal is from the judgment. Several errors are assigned, all to the effect that the court erred in sustaining plaintiff's motion for judgment on the pleadings.

The several sections of the Revised Statutes applicable to this case are as follows:

"Sec. 5715. Resident aliens may take in all cases, by succession as citizens; and no person capable of succeeding under the provisions of this title is precluded from such succession by reason of the alienage of any relative; but no nonresident foreigner can take by succession, unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession.

"Sec. 5716. When succession is not claimed as provided in the preceding section, the district court, on information, must direct the attorney general to reduce the property to his or the possession of the territory, or to cause the same to be sold, and the same, or the proceeds thereof, to be deposited in the territorial treasury for the benefit of such nonresident foreigner, or his legal representative, to be paid to him whenever, within five years after such deposit, proof to the satisfaction of the terri-

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torial controller and treasurer is produced that he is entitled to succeed thereto.

"Sec. 5717. When so claimed, the evidence and the joint order of the controller and treasurer must be filed by the treasurer as his voucher, and the property delivered or the proceeds paid to the claimant on filing his receipt therefor. If no one succeeds to the estate or the proceeds, as herein provided, the property of the decedent is placed by the territorial treasurer to the credit of the school fund."

As Hempel died intestate, on the sixteenth day of April, 1887, the right of any nonresident foreigner to claim said land under the provisions of said section 5715 expired on the sixteenth day of April, 1892. (See *State v. Smith*, 70 Cal. 153, 12 Pac. 121; *People v. Roach*, 76 Cal. 294, 18 Pac. 407.) After the last-mentioned date, no nonresident foreigner could take said real property by succession.

The question arises then, In whom did the title thereto vest after the five year period named in said section 5715? It is contended by counsel for appellant that the title to said real estate must vest somewhere, and could not be held in abeyance, and that it vested in the sister, as heir at law of the deceased. The averment in the answer in regard to deceased having a sister is as follows: "Defendant admits that succession to the 'estate of said Hempel and the said premises has not been claimed by any heir of said deceased, and that more than five years have elapsed since the death of said Hempel, but alleges that said Hempel died leaving a sister residing in Vienna, Austria, whose name is unknown to defendant." It is there admitted that no heir of the deceased had claimed said premises within the five years allowed therefor by the provisions of said section 5715. Said sister was barred from all right of succession to said property at the end of said five years period. If she had title (which we do not concede) during those five years, it ended when that period ended. She could not successfully claim succession thereafter.

Conceding the suggestion of counsel that the title could not remain in abeyance, where did it go when the nonresident foreigner could claim it no longer? We think it went to the state,

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to be disposed of as provided by said sections 5716 and 5717. The nonresident foreign heir cannot recover the real property of his decedent after said period of five years, but the law permits him to receive the proceeds of the sale of such real estate within five years after the same has been deposited with the state treasurer, upon proper proof. As no succession was claimed within the five year period, section 5716, *supra*, provides that the district court, on information, must direct the attorney general to reduce the property to his possession, or that of the state, or cause it to be sold, and the proceeds thereof to be deposited in the state treasury, for the benefit of such nonresident foreigner or his legal representative, to be paid to him; provided, within five years after such deposit, satisfactory proof be made that he is entitled to succeed thereto. The proceeding therein provided is not for the purpose of transferring the title to the property to the state, or declaring an escheat to the state. It is for the purpose of reducing the property to the possession of the attorney general or the state, or to cause it to be sold. In this country the general rule is that, when the title to land fails for want of heirs, it escheats to the state. That rule is applicable in this state. No nonresident foreign heir having appeared and claimed succession within five years after the death of Hempel, said real estate escheated to the state, without inquest in the nature of office found, to vest title in the state. The title passed by operation of law, without court proceedings of any kind, as no proceeding or inquest in the nature of "office found" is provided for by statute in such cases in this state. As the state acquired title to said land by escheat on the sixteenth day of April, 1892, any assessment of taxes on said land thereafter was absolutely void, and no title could result therefrom. The judgment of the court below is affirmed. Costs of this appeal are awarded to respondent.

Huston and Quarles, JJ., concur.

Argument for Appellants.

(December 30, 1898.)

MCGINNESS v. STANFIELD.

[55 Pac. 1020.]

WATER RIGHTS—APPROPRIATION OF WATER—JURISDICTION OF COURTS.—

In an action to settle the water rights of various parties upon a stream, the district court, after establishing the priorities of the various appropriators, proceeded to decree the times and the quantity which each appropriator was permitted to use of such waters; *held*, error, it not being the province of the court to dictate how or when the right acquired by the appropriator should be exercised, so long as such use was within the limits of his appropriation.

VERBAL CONTRACT—ADMISSIBILITY IN EVIDENCE.—Under the statutes of Idaho, a verbal contract for the sale or transfer of real estate is not admissible in evidence against a stranger to such contract.

(Syllabus by the court.)

APPEAL from District Court, Elmore County.

N. M. Ruick and F. E. Ensign, for Appellants.

This suit was instituted for the purpose of establishing the respective priorities of right to the use or the waters of Cold Spring creek in Elmore county. The judgment should not be upheld, inasmuch as it is in violation of the plain provisions of the statutes of this state enacted in 1881 (Laws 11th Sess., p. 267), and continued in force in the Revised Statutes, sections 3155, 3159 and 3165. (*Hillman v. Hardwick*, 3 Idaho, 255, 28 Pac. 438; *Geertson v. Barrack*, 3 Idaho, 344, 29 Pac. 42; *Kirk v. Bartholomew*, 3 Idaho, 367, 29 Pac. 40.) The verbal sale by Stover and Montgomery of the improvements on the Cold Spring ranch, if it applied to the water right used therewith, did not operate to transfer any right whatsoever to the prior use of such water, but amounted to an express abandonment of such water right. (Kinney on Irrigation, secs. 253, 264; *Hill v. Newman*, 5 Cal. 445, 63 Am. Dec. 140; *Smith v. O'Hara*, 43 Cal. 371, 376; *King's River Ditch Co. v. Canal Co.*, 60 Cal. 408; *Barkley v. Tiekele*, 2 Mont. 59.) Prior to the enactment of any law of the territory of Idaho, Congress

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had recognized the existence of rights to the use of water acquired by priority of possession, and for a time prior thereto, as well as since, water rights have been regarded as real estate or an interest in real estate to be conveyed by an instrument in writing only. It was so decided in California as early as 1855. (*Hill v. Newman*, 5 Cal. 445, 63 Am. Dec. 140; *Lobdell v. Hall*, 3 Nev. 507; *Barkley v. Tiekele*, 2 Mont. 59.)

Hawley & Puckett, for Respondents.

Counsel for appellant say that the court cannot decree, in the absence of a statute conferring such powers, that a claimant who has established a priority shall make use of said right at certain seasons only. We urge that the courts not only have such power, but that it is their duty, to limit the use to certain seasons in certain cases. (*Eddy v. Simpson*, 3 Cal. 249, 58 Am. Dec. 408; *Nevada Water Co. v. Powell*, 34 Cal. 109, 91 Am. Dec. 685; *Ortman v. Dixon*, 13 Cal. 36; *Lobdell v. Simpson*, 2 Nev. 274, 90 Am. Dec. 537.) The rights of each appropriator are to be determined by the condition of things at the time he makes his appropriation. So far is this rule carried that those who were prior to him can in no way change in extent their use to his prejudice, but are limited to the right enjoyed by them when he secured his. (*Proctor v. Jennings*, 6 Nev. 87, 3 Am. Rep. 240. To the same effect are *Cole v. Logan*, 24 Or. 304, 33 Pac. 568; *Ramelli v. Irish*, 96 Cal. 214, 31 Pac. 41; *Gallaher v. Montecito V. W. Co.*, 101 Cal. 242, 35 Pac. 770; *McGuire v. Brown*, 106 Cal. 660, 39 Pac. 1060; *Roeder v. Stein*, 23 Nev. 92, 42 Pac. 867.) Can a water right be transferred by oral sale? A right which secures to the owner of a tract of land water for irrigating or other purposes necessary to the enjoyment of the land becomes appurtenant to said land and passes by a conveyance thereof. (*Cane v. Crafts*, 53 Cal. 135; *Farmer v. Ukiah Water Co.*, 56 Cal. 11; *Standart v. R. V. Water Co.*, 77 Cal. 399, 19 Pac. 689; *Cross v. Kitts*, 69 Cal. 217, 58 Am. Rep. 558, 10 Pac. 409.)

HUSTON, J.—This action was brought to settle the rights of the various parties thereto to the waters of Cold Spring creek, in the county of Elmore. The case was heard by the

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court without a jury, and to the decree entered by the court the appellants take certain exceptions, and the same are brought to us by this appeal for review.

In its findings of fact, the court, after finding the date of the appropriation of water by the various parties, and the amount appropriated by them severally, proceeds to declare the amount to be used on each several tract, and the time when the same may be used, and it is to this action of the court that the first exception of the appellants goes. Counsel for appellants contend that when the court had found the fact of appropriation, and had fixed the question of priority and extent of appropriation between the various claimants, its powers ceased. Section 3155 of the Revised Statutes of Idaho is as follows: "The right to the use of running water flowing in a river, or stream, or down a canyon or ravine, may be acquired by appropriation." Section 3159 is as follows: "As between appropriators, the one first in time is the first in right." Section 3165: "All ditches, canals, and other works heretofore made, constructed or provided, by means of which the waters of any stream have been diverted and applied to any beneficial use, must be taken to have secured the right to the waters claimed, to the extent of the quantity which said works are capable of conducting, and not exceeding the quantity claimed, without regard to or compliance with the requirements of this chapter." These sections of the Revised Statutes have been several times passed upon and construed (if any construction was required) by this court. (See *Hillman v. Hardwick*, 3 Idaho, 255, 28 Pac. 438; *Geertson v. Barrack*, 3 Idaho, 344, 29 Pac. 42; *Kirk v. Bartholomew*, 3 Idaho, 367, 29 Pac. 40.) Priority of appropriation having been established, as well as the amount of the water appropriated, and the beneficial use thereof, it seems to us that the functions of the court under the statute have reached their limit. For the court to dictate the manner in which the appropriator shall use the water so appropriated, so long as it is adapted to a useful or beneficial purpose, is going beyond its province. It is an interference with the right conferred by the statute. We have examined the cases cited by counsel for respondents, but we are unable to see their applicability to the case at bar, or wherein they conflict with the rule heretofore laid down by this court.

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The district court finds in its fourth finding of fact: "That lands upon which wild hay is raised, or which are irrigated for pasture only, do not require, in the vicinity of Cold Spring creek, water to be used thereon later than July 1st of each year." The only evidence we find in the record upon this subject is found in folio 276 of the record, and is as follows: "It has been the custom of the plaintiffs and of the other parties to this suit using water for irrigation from the stream to turn the water out upon the land as early in the spring of the year as the frost left the ground, and, with the exception of the intervals between irrigating periods, and while removing the crops from the land, continue the use of the water until the ground froze in the fall." We do not think this evidence supports the said fourth finding. We are of the opinion that, so long as the appropriator of water applies the same to a beneficial or useful purpose, he is the judge, within the limits of his appropriation, of the times when and the place where the same shall be used.

Upon the trial the defendant Stanfield was permitted, over the objection of the appellants, for the purpose of establishing priority of appropriation of the water of Cold Spring creek, to show the following facts: "That prior to May 1, 1869, Jacob Stover and Ely Montgomery settled upon the land afterward known as the 'Cold Spring ranch,' now owned by the defendant Stanfield, and made improvements thereon. In the spring of that year they constructed a ditch, and diverted from Cold Spring creek a quantity of water sufficient for the irrigation of these lands; the quantity actually used, needed, and required upon the land under cultivation and for hay being one hundred and thirty-six inches, measured under a four-inch pressure. Stover and Montgomery continued in possession of the land, using said amount of water in the cultivation thereof, until the spring of 1875, at which time they sold the improvements on the land to O. S. Glenn for the consideration of \$2,000. No papers were executed, nor was any transfer or conveyance in writing made by Stover and Montgomery, or either of them, to Glenn, of the land, the improvements thereon, or the water rights appurtenant to or used with said land; neither was there any evidence of a transfer or conveyance in writing by Stover

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and Montgomery, or either of them, to any grantor or predecessor in interest therein, or of the improvements thereon, or of the water rights appurtenant thereto." Appellants assign the action of the court in permitting said defendant, over the objection of plaintiffs, to establish title to the land and the water right appurtenant thereto by proof of an oral transfer, as error. Possessory titles to public lands have been defined by the statutes of Idaho as real estate since the organization of the territory, and the following provision, in substance, has been in the statutes of Idaho since the laws of the first session of the territorial legislature (section 6007): "No estate or interest in real property, other than for leases for a term not exceeding one year, nor any trust or power over or concerning it, or in any manner relating thereto can be created, granted, assigned, surrendered or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing." Under the statutes we are unable to hold that title to real estate, or an interest in real estate, can be established by proof of a verbal transfer. The water right of the defendant Stanfield dates from the time when Glenn went into possession under his purchase from Stover and Montgomery, and commenced to use the water. Counsel for respondents cite several decisions in support of the contrary contention, but, as it does not appear that they were made under statutes similar to ours, we can hardly accept them as authority for abrogating our own statutes.

What we have here said applies as well to the proof offered by the defendant Ida McGinness in relation to her claim, to wit, a verbal transfer from Harvey Glenn. The deed subsequently procured by her from Glenn, some fourteen years after he had left the country, could only have effect from its date.

The judgment of the district court is reversed, and the cause remanded to the district court, with instructions to correct its findings of fact and modify its decree in accordance with the views herein expressed; the costs to appellants.

Sullivan, C. J., and Quarles, J., concur.

Argument for Appellant.

ON REHEARING.

(January 31, 1899.)

Per CURIAM.—The petition for rehearing filed by the respondents has been carefully considered. It concedes the correctness of the rule announced in the original opinion that the trial court erred in restricting the use of the water appropriated by the appellants during certain months, but insists that we erred in holding that an oral contract of sale of a possessory claim upon public lands is not admissible in evidence against a claimant whose right is anterior to such oral contract. Upon this point we are still satisfied of the correctness of our conclusion, which we cannot change without nullifying provisions in our statutes. No good cause appearing why a rehearing should be granted, the same is hereby denied.

(December 31, 1898.)

NASHOLDS v. McDONELL.

[55 Pac. 894.]

PERSONS WHO CANNOT TESTIFY.—Section 5957 of the Revised Statutes of Idaho, subdivision 3, does not apply to an action brought to establish a trust.

STATUTE OF LIMITATIONS AS TO CESTUI QUE TRUST.—The statute of limitations does not begin to run against a *cestui que trust* until a trust is denied, or some act is done by the trustee, inconsistent with the trust. The record in this case examined and found to fully sustain the findings of the jury and judgment of the court. (Syllabus by the court.)

APPEAL from District Court, Lemhi County.

John A. Bagley and King, Burton & King, for Appellant.

Where the title to real property passes by the agreement and consent of the parties, by deed absolute in form, expressing a valuable consideration, in the absence of fraud, mistake or a fiduciary relation, a trust cannot be grafted into the transaction

Argument for Appellant.

or the terms of the deed overcome by parol testimony; the transaction comes within the statutes of fraud. (Perry on Trusts, par. 83; *Flint v. Sheldon*, 13 Mass. 443, 448, 7 Am. Dec. 162; Browne on Statute of Frauds, par. 106; 10 Am. & Eng. Ency. of Law, 59, and notes.) The cases all recognize that the party who undertakes to establish by parol evidence a trust in lands in opposition to the deed or other written evidence of the title has a task of great difficulty, and he must fail unless his evidence is such as to establish his case beyond all controversy. Public policy and the safety and security of titles require that this rule should be rigidly enforced. (*Midmer v. Midmer*, 26 N. J. Eq. 304; *Clement v. Clement*, 1 Jones' Eq. 184; *Kenedy v. Kenedy*, 57 Mo. 73; *Johnson v. Quarles*, 46 Mo. 423; *Hearne v. Insurance Co.*, 20 Wall. 488; *Maxwell Land Grant Case*, 121 U. S. 381, 7 Sup. Ct. Rep. 1015.) The testimony of respondent was incompetent and inadmissible. Respondent does not claim that Nasholds ever had the money, or took the title to the property in violation of any fiduciary or confidential relation, but that he, McDonell, paid one-half the money to Colvin, and directed him to give the deed to Nasholds. If a trust exists, it is an express trust, and cannot be proved by parol. (Perry on Trusts, sec. 79, and cases heretofore cited.) This suit is in the nature of a claim or demand against the estate of a deceased person, and respondent cannot be a witness as to any matter of fact occurring before the death of such deceased person. (Idaho Rev. Stats., sec. 5957, subd. 3.) Courts of equity often act upon their own inherent doctrine of discouraging for the peace of society antiquated demands, by refusing to interfere where there has been gross laches in prosecuting rights, and will not give relief against conscience or public convenience where a party has slept upon his rights. (Woods' Limitations of Actions, 435; 2 Story's Equity, par. 1520; *Stearns v. Page*, 7 How. 819; *McGivney v. McGivney*, 142 Mass. 156, 7 N. E. 721; Perry on Trusts, secs. 141, 869; 1 Pomeroy's Equity Jurisprudence, 419.) This action is barred by the statute of limitations of this state. Civil actions can only be commenced within the periods prescribed in

Argument for Respondent.

this title, after the cause of action shall have accrued. (Idaho Rev. Stats., secs. 4030, 4036; *Lord v. Morris*, 18 Ca. 482; *White v. Sheldon*, 4 Nev. 280, 288.)

Thomas F. Terrell and W. T. Reeves, for Respondent.

The question of the statute of fraud is a new one in this case. It was never mentioned or suggested at the trial. We deem it a sufficient answer to such a contention, even if their position were true, that defendant at no time during the trial, either by demurrer, answer, or objection to testimony, raised the question of the statute of fraud, and cannot now, on this appeal, for the first time, be heard to say the transaction is within the statute. When a contract within the statute of fraud is proved by parol evidence without objection or exception, the right to invoke the statute is waived, and it cannot afterward be insisted upon. (*Kraft v. Greathouse*, 1 Idaho, 254, 259; *Osborne v. Endicott*, 6 Cal. 149, 65 Am. Dec. 498; *Nunez v. Morgan*, 77 Cal. 427, 19 Pac. 753; *Broder v. Conklin*, 77 Cal. 330, 19 Pac. 513; *Sweetland v. Shattuck*, 66 Cal. 31, 4 Pac. 885; *Dorris v. Sullivan*, 89 Cal. 62, 26 Pac. 621.) The objection to the evidence must be more than a general objection to competency; it must call the court's attention to the reason why it is incompetent; the objection must be that the contract is within the statute, and is not in writing. (*Sweetland v. Shattuck*, 66 Cal. 31, 4 Pac. 885; *Eversdom v. Mahew*, 85 Cal. 1, 21 Pac. 431-433, 24 Pac. 382; *Keys v. Grannis*, 3 Nev. 556; *State v. Jones*, 7 Nev. 415; *Thompson v. Thornton*, 50 Cal. 142; *Wimans v. Hassey*, 48 Cal. 634; *Saterlee v. Bliss*, 36 Cal. 489-507; *Dreux v. Domic*, 18 Cal. 83-89; *Owen v. Frink*, 24 Cal. 171-177.) If one party pays only a part of the consideration, the party taking the title to the whole land becomes a trustee for the other party *pro tanto*. (*Case v. Coddington*, 38 Cal. 191; *Hidden v. Jordon*, 21 Cal. 92; *Millard v. Hathway*, 27 Cal. 119-139; *Wasley v. Forman*, 38 Cal. 90.) It is well settled that if a man pays a consideration and has a deed made to a stranger to his blood, a resulting trust at once arises in favor of the party who pays the purchase money. The law *prima facie* presumes a trust in favor of the person who has paid the purchase money. (1 Perry on Trusts,

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secs. 143-147; *Cutler v. Tuttle*, 19 N. J. Eq. 558; *Davis v. Davis*, 18 Colo. 66, 31 Pac. 499; *Lakin v. Sierra Butte Min. Co.*, 25 Fed. 337.) Counsel for appellant discuss the question as to the competency of respondent to testify as a witness to the transactions with Egbert Nasholds, creating the trust claimed; the said Nasholds being dead at the time of trial. Appellant contends that to establish and enforce this trust is in the nature of a claim against the estate of Nasholds, deceased. Section 5957, subsection 3 of the Revised Statutes of Idaho, is taken literally from section 1880, subsection 3, of the Code of Civil Procedure of California, and, of course, in adopting the statute of California, we adopted such construction as the courts of that state had placed upon it. Fortunately for respondent, this identical statute has been learnedly construed by a comparatively recent California case, in an action establishing and enforcing a resulting trust, to which we call the court's especial attention. (*Meyers v. Reinstein*, 67 Cal. 89, 7 Pac. 192.) The statute of limitation did not, therefore, begin to run until after the repudiation of trust in 1894. The repudiation of the trust was a fraud upon the respondent, which he did not, and could not, discover until such repudiation occurred. (*White v. Sheldon*, 4 Nev. 280; *McClure v. Colyear*, 80 Cal. 378, 22 Pac. 175; *Barroilhet v. Anspacher*, 68 Cal. 116, 8 Pac. 804; *Love v. Watkins*, 40 Cal. 548-570, 6 Am. Rep. 624; *Jones v. Throckmorton*, 57 Cal. 368.) The statute will not begin to run against the *cestui que trust* or joint tenant while the latter is in possession of the trust estate. (*Gilbert v. Sleeper*, 71 Cal. 290, 12 Pac. 172; *McCauley v. Harvey*, 49 Cal. 497.) The statute of limitations does not begin to run against a *cestui que trust* in possession until ouster, whether the trust be an express or an implied trust. (*Henderson v. Hines* (Pa.), 6 Atl. 52; *Lakin v. Sierra Butte G. M. Co.*, 25 Fed. 337; *Taylor v. Holmes*, 14 Fed. 498; *Luco v. De Toro*, 91 Cal. 405, 27 Pac. 1082-1084.)

•HUSTON, J.—Plaintiff brings this action to establish a trust in his behalf in certain real estate situated in Salmon City, Lemhi county, Idaho, and to compel defendant to convey to him a one-half interest in said property. The case was tried by

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the court with a jury. The facts, as shown by the record and found by the jury, are substantially as follows: in the year 1882 plaintiff and Egbert Nasholds, the husband of appellant, were partners engaged in the business of running a stage line in Lemhi county, Idaho. In September of that year, plaintiff and said Nasholds purchased of one Calvin the real estate in question, being certain lots in the town of Salmon City, Lemhi county, giving in payment therefor their two joint and several notes for the sum of \$500 each, due in twelve and eighteen months, respectively, with interest at the rate of twelve per cent per annum. Immediately after the purchase of said property, plaintiff and said Nasholds (the latter being a married man, and the plaintiff a single man), went into possession of said property, and continued so in possession until the death of said Nasholds, which occurred in March, 1892, since which time plaintiff and defendant have occupied said premises up to the time of the commencement of this suit. At the time of the purchase of said property, the same was public land of the United States, but was subsequently patented under the townsite laws of the United States; and thereafter, in 1883, the same was deeded by the probate judge of Lemhi county to said Egbert Nasholds. This conveyance by the probate judge to Nasholds was made in pursuance of an agreement or understanding between plaintiff and said Nasholds that, as he (Nasholds) was a married man, he should take the title, and hold the same for the joint benefit of himself and plaintiff. In 1884, plaintiff and said Nasholds having become involved in their operations of running said stage line, they deemed it advisable to file a homestead upon said property; and, as Nasholds was the only one competent to file such claim, it was agreed that he should file it. In 1885, the firm made an assignment of their stage property and interests. The property had been used and occupied as a hotel for some time prior to the death of Nasholds. The hotel business was conducted by Nasholds and his wife, the defendant, up to the time of Nasholds' death, since which time it has been conducted by defendant and her two daughters. Plaintiff continued to occupy the premises jointly with defendant during the entire time. No accounts were ever kept, either be-

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tween plaintiff and Nasholds, or plaintiff and defendant since the death of Nasholds. Plaintiff contributed toward the expenses of running the house. No account for board was ever made against him. He also contributed his portion in paying the taxes in 1892 and 1893. Some improvements were made upon the premises. They were paid jointly by defendant and plaintiff. The notes given for the purchase price of the property were not paid at maturity, and suit was brought thereon, and judgment recovered against Nasholds and plaintiff, which was subsequently paid by them, plaintiff paying something more than one-half. No articles of copartnership, or other writings of any kind, were ever made between the parties. This sort of partnership dealings, while repugnant to all correct business principles and rules, was, in the early settlement of this country, and to some extent still continues to be, quite common, especially in mining camps and localities. All the rents and profits from the property have been appropriated by the defendant. At the conclusion of the trial the court submitted fifteen findings to the jury, all of which were found in favor of the plaintiff, and were accepted by the court. We have carefully examined the record, and are satisfied that the findings of the jury are fully supported by the evidence.

The objection of the defendant to the competency of plaintiff as a witness is not well taken. Subdivision 3 of section 5957 of our Revised Statutes has no application to a case of this character. (*Myers v. Reinstein*, 67 Cal. 89, 7 Pac. 192.)

The statute of limitations does not commence to run, in cases of trust, until the trust is denied, either directly, or by some act by the trustee inconsistent with the trust. None of these things occurred in this case until the time, or immediately preceding the time, of the commencement of this suit. (*White v. Sheldon*, 4 Nev. 280.)

Finding no error in the record, and believing that exact justice has been done between the parties by the judgment and decree of the trial court, the judgment and decree of the district court are affirmed, with costs to respondent.

Sullivan, C. J., concurs.

Points decided.

Quarles, J., having been of counsel for the respondent, took no part in the hearing or decision of this case.

ON REHEARING.

(January 28, 1899.)

SULLIVAN, J.—A petition for rehearing has been filed herein. As it presents nothing new, and nothing but what was fully considered by the court in the determination of the case, a rehearing must be denied, and it is so ordered.

Huston, C. J., concurs.

Quarles, J., having been of counsel for one of the parties, took no part in the consideration or determination of the petition for a rehearing.

(January 3, 1899.)

STATE v. ANTHONY.

[55 Pac. 884.]

RAPE—INSUFFICIENCY OF EVIDENCE.—Where improper and prejudicial evidence is introduced by the state, a judgment against the defendant must be set aside, and the cause remanded.

SAME—SUBSTANTIAL CONFLICT IN EVIDENCE.—Where there is a substantial conflict in the material evidence, and there has been improper and prejudicial evidence introduced by the state, this court will not undertake to determine whether the conflicting evidence is sufficient to establish the guilt of the defendant beyond a reasonable doubt.

CROSS-EXAMINATION OF DEFENDANT.—Under the provisions of section 6082 of the Revised Statutes, after the examination of a witness has been concluded, on both sides, the witness may be recalled by leave of court, for further examination.

IMPEACHMENT.—Under the facts of this case, it was error to compel the defendant to answer questions concerning an alleged attempt to debauch a child, which matter was not connected in the remotest degree with the crime for which the defendant was being tried.

SAME.—The credibility of a witness may be impeached by proof that he has made statements relevant to the issues out of court, contrary to what he has testified to on the trial.

Argument for Appellant.

SAME.—Under the provisions of section 6082 of the Revised Statutes, a witness may be impeached: 1. By contradictory evidence; 2. By evidence that his general reputation for truth, honesty or integrity is bad; but cannot be impeached by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that the witness has been convicted of a felony.

INSTRUCTIONS—REASONABLE DOUBT.—It was not error for the court to refuse to instruct the jury, that however slight the “reasonable doubt” might be if fairly based on the evidence, the defendant must be acquitted.

(Syllabus by the court.)

APPEAL from District Court, Cassia County.

Hawley & Puckett, for Appellant.

It is the universal rule that where the defendant denies the act, the alleged injured party must be corroborated. (*Matthews v. State*, 19 Neb. 330, 27 N. W. 234; *Gazley v. State*, 17 Tex. App. 267; *People v. Tierney*, 67 Cal. 54, 7 Pac. 37; *State v. Cook*, 65 Iowa, 560, 22 N. W. 675; *Carney v. State*, 118 Ind. 525, 21 N. E. 48.) Rebutting evidence has been defined by the supreme court of Idaho as that “which is given to explain, repel, counteract or disprove testimony or facts given in evidence by the adverse party. (*People v. Page*, 1 Idaho, 189.) The rule is well settled that in rebuttal in criminal cases the prosecution is restricted to evidence controverting the facts proven by the defendant. (3 Rice on Evidence, 326 et seq., and authorities cited; *Ford v. Niles*, 1 Hill, 301.) Evidence of other crimes will not be admitted upon the trial of a defendant upon a criminal charge. (3 Rice on Evidence, 207, 208; *State v. Lapage*, 57 N. H. 245, 24 Am. Rep. 69, and authorities cited; *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54; *Shaffner v. Commonwealth*, 72 Pa. St. 60, 13 Am. Rep. 649; *People v. Sharp*, 107 N. Y. 427, 1 Am. St. Rep. 858, 14 N. E. 319; *Commonwealth v. Campbell*, 1 Allen, 541; *People v. Fultz*, 109 Cal. 258, 41 Pac. 1040.) When several felonies are connected together, so as to form one entire transaction, the one is evidence to show the character of the other. (Roscoe’s Criminal Evidence, 86; 3 Rice on Evidence, 208, and authorities cited; *People v. Lane*, 100 Cal. 379, 34 Pac. 856.) But it is never

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competent in a criminal trial to show that defendant was guilty of an independent crime not connected with or leading up to the crime for which he is on trial, except for the purpose of showing motive, interest or guilty knowledge. (3 Rice on Evidence, 209; *People v. Greenwall*, 108 N. Y. 301, 2 Am. St. Rep. 415, 15 N. E. 404; *People v. Walters*, 98 Cal. 138, 32 Pac. 864.) And wherever there is doubt as to the admissibility of the evidence, the doubt should be resolved in favor of the defendant, as such evidence, from its very nature, is prejudicial in its character. (3 Rice on Evidence, 209; *Shaffner v. Commonwealth*, 72 Pa. St. 60, 13 Am. Rep. 649.) But the prosecution cannot show in evidence the commission of other offenses for the purpose of increasing the likelihood of his having committed the particular crime charged. (*People v. Jones*, 31 Cal. 565; *People v. Hartman*, 62 Cal. 562; *People v. McNutt*, 54 Cal. 116; *People v. Scott*, 74 Cal. 94, 15 Pac. 384; *People v. Jones*, 32 Cal. 80; *People v. O'Brien*, 96 Cal. 171, 31 Pac. 45; *Roper v. Territory*, 7 N. Mex. 255, 33 Pac. 1014; *State v. Bonsor*, 49 Kan. 758, 31 Pac. 736; *Shaffner v. Commonwealth*, 72 Pa. St. 60, 13 Am. Rep. 649; *Farris v. People*, 129 Ill. 129, 16 Am. St. Rep. 283, 21 N. E. 821; *State v. Sterrett*, 71 Iowa, 386, 32 N. W. 387.) Guilt cannot be shown nor can the weight of evidence be increased by showing that defendant has committed other offenses. (*People v. Tucker*, 104 Cal. 440, 38 Pac. 195; *People v. Smith*, 106 Cal. 73, 39 Pac. 40.)

R. E. McFarland, Attorney General, and E. J. Dockery, for the State.

For the purposes of this case, it may be admitted that corroborating evidence is necessary to convict, for we have here very complete and the strongest kind of corroborating evidence of guilt, and the cases cited by appellant in support of that rule need not be here examined or questioned, although authorities are numerous where convictions have been sustained which were founded on the uncorroborated evidence of a girl below ten years. (Bishop's New Criminal Procedure, 968, subd. 2; *State v. Lattin*, 29 Conn. 389; *Anonymous*, 1 Russell on Crimes, 3d Eng. ed., 696, and note.) The extent to which

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cross-examination may be carried is a matter resting in the sound discretion of the trial court. (Jones on Evidence, 837, 842, and cases cited in note 18; *Lewis v. Steiger*, 68 Cal. 200, 8 Pac. 884; *Davis v. Roby*, 64 Me. 427; *State v. Roberts*, 81 N. C. 65; *Ballard v. Lambert*, 40 Ala. 204; 1 Greenleaf on Evidence, sec. 462; 2 Taylor on Evidence, sec. 1451.) If charge is adultery, the accused may be asked if he has not committed the offense with the person named in the indictment at other times. (Jones on Evidence, sec. 845; *Commonwealth v. Nichols*, 114 Mass. 285, 19 Am. Rep. 346.) Where the action was for indecent assault counsel were allowed to ask the defendant whether he had before been arrested for a similar offense and whether he had paid money in settlement of such former charge. (Jones on Evidence, sec. 842; *Leland v. Kauth*, 47 Mich. 508, 11 N. W. 292; *State v. Martin*, 124 Mo. 514, 28 S. W. 12.) In various later decisions the wholesome rule has been adopted that a witness may be questioned specially on any vicious or criminal act of his life, and compelled to answer unless he claims his privilege. (*People v. Webster*, 139 N. Y. 73, 34 N. E. 730; *State v. Hack*, 118 Mo. 92, 23 S. W. 1089; *State v. Pratt*, 121 Mo. 566, 26 S. W. 556; *Carrol v. State*, 32 Tex. Cr. Rep. 431, 40 Am. St. Rep. 786, 24 S. W. 100; *People v. Harrison*, 93 Mich. 594, 53 N. W. 725; *Roberts v. Commonwealth*, 94 Ky. 499, 22 S. W. 845.) It is a general rule that when a party becomes a witness the same rules of cross-examination apply to him as to other witnesses. (*Clark v. Reese*, 35 Cal. 89; *Howland v. Jenks*, 7 Wis. 57; *State v. Merriman*, 34 S. C. 16, 12 S. E. 619.) And even greater liberty in such cases may be allowed in cross-examination on matters not mentioned in direct examination. (*Knapp v. Schuerder*, 24 Wis. 70; *Morris v. Cargill*, 57 Wis. 251, 15 N. W., 148; *State v. Bulla*, 89 Mo. 595, 1 S. W. 764; *Este v. Wilshire*, 44 Ohio St. 636, 10 N. E. 677; *Commonwealth v. Price*, 10 Gray, 472, 71 Am. Dec. 668, and note; *Sharp v. Hoffman*, 79 Cal. 404, 21 Pac. 846; *State v. Ober*, 52 N. H. 459, 13 Am. Rep. 88; *Commonwealth v. Nichols*, 114 Mass. 285, 19 Am. Rep. 346; *Commonwealth v. Smith*, 163 Mass. 411, 40 N. E. 189; *Raines v. State*, 88 Ala. 91, 7 South. 315; *Peck v. State*, 86 Tenn. 259, 6 S. W. 389; *Connors v. People*, 50 N. Y. 240.)

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A prior purpose to ravish the same woman, or perhaps any other, as indicated by threats or other evidence, may be shown. (*Wood v. State*, 28 Tex. App. 61, 12 S. W. 405; *Barnes v. State*, 88 Ala. 204, 16 Am. St. Rep. 48, 7 South. 38; *Massey v. State*, 31 Tex. Cr. Rep. 371, 20 S. W. 758; *Sharp v. State*, 15 Tex. App. 171.)

SULLIVAN, C. J.—The defendant was convicted of the crime of rape, alleged to have been committed upon a girl ten years of age, and sentenced to a term of twenty-five years' imprisonment. This appeal is from the judgment and the order overruling a motion for a new trial. The errors assigned go to the insufficiency of the evidence to sustain the verdict, and in compelling the defendant to testify in regard to an alleged criminal assault on a young girl by name of Marshall, alleged to have occurred in 1895, and in allowing witness Alfred Marshall to testify in regard to said alleged criminal assault.

As to the insufficiency of the evidence to sustain the verdict: We have made a careful examination of the evidence, and no good can result from an analysis of it here. Had the jury found the defendant guilty upon the legal evidence found in the transcript, this court would not be inclined to disturb the verdict; but as improper evidence was introduced, over the objection of the defendant, we are unable to determine what the verdict of the jury would have been if the improper evidence had not been introduced. Whether the legal evidence introduced on the trial was sufficient to establish the guilt of the defendant beyond a reasonable doubt is a question, in the first instance at least, for the jury, as there is a material conflict therein.

At the conclusion of the evidence for the defense, and after the defense had rested, the defendant, over his objection, was recalled by the prosecution for further cross-examination, and this is urged as error. Section 6081 of the Revised Statutes, provides, *inter alia*, that, after the examinations on both sides are concluded, the witness cannot be recalled without leave of court, and leave is granted or withheld in the sound discretion of the court. Upon a proper showing, the court, exercising a sound discretion, may permit the recall of a witness for further

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examination. In this case the witness was recalled for further cross-examination, after defendant had rested. And section 6079 of the Revised Statutes, as amended by Laws of 1889 (15th Sess.) page 1, provides that "the opposite party may cross-examine the witness as to any facts stated in his direct examination or connected therewith, and, in so doing, may put leading questions. The cross-examination is confined to the facts stated by the witness in his direct examination, or connected therewith. The pretended cross-examination did not relate to any facts stated by the witness in his direct examination, or connected therewith. The testimony of the defendant in his direct examination was confined to the crime for which he was being tried, and the pretended cross-examination related wholly to an alleged occurrence between the defendant and the Marshall girl, in the year 1895, and not connected with the crime for which defendant was being tried in the remotest degree.

But it is contended by counsel for the state that said cross-examination was not "for the purpose of increasing the likelihood of defendant having committed the offense with which he was charged," but was for the purpose of testing defendant's credibility, and for impeachment. The credibility of a witness may be impeached by proof that he has made statements out of court contrary to what he testified to at the trial; but that is confined to such matters as are relevant to the issues. (1 Greenleaf on Evidence, 13th ed., sec. 462.) Section 6082 of the Revised Statutes, provides how a witness may be impeached (1) by contradictory evidence, or (2) by evidence that his general reputation for truth, honesty, or integrity is bad. That section also provides that a witness cannot be impeached by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that the witness had been convicted of a felony. In this case the district attorney undertook by cross-examination to show that the defendant attempted to debauch a child, about one year prior to his conviction in this action. The defendant denied the charge, and the district attorney then put on the witness, Alfred Marshall, who testified that he caught the defendant in a compromising position with the child above referred

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to. In other words, an attempt was made to discredit and impeach the defendant by contradicting him in regard to a particular wrongful act, that had not the remotest connection with the crime of which the defendant stood charged and was convicted. An attempt was made to discredit the defendant on a matter entirely irrelevant to the issue then being tried. That was not permissible. It is said in section 463 of 1 Greenleaf on Evidence, thirteenth edition: "But it is only in such nature as are relevant to the issue that the witness can be contradicted." Evidence of a particular wrongful act cannot be introduced to impeach a witness, "except that it may be shown by the examination of the witness or the record of the judgment that he had been convicted of a felony." (See Rev. Stats., sec. 6082, *supra*.) It is not claimed that the defendant had been convicted of the alleged wrongful act of defendant with the Marshall girl. In fact, the record shows that he had not been. That provision of said section of the Revised Statutes prohibits the impeachment of a witness by evidence of a wrongful act, unless such act was a felony, and the witness had been convicted thereof.

Counsel for the state cite authorities which are claimed to sustain their contention on the point under consideration. We shall not attempt to review them here; for, if they sustain respondent's contention, they must be under statutes different from our section 6082 of the Revised Statutes. *State v. McGuire*, 87 Mo. 642, is cited. It holds that, if a defendant goes on the stand as a witness, he may be impeached by the record of former conviction of grand larceny, and supports the conclusion reached in this opinion. Nothing could have been more prejudicial to the defendant than the testimony under consideration. The court having admitted it as competent evidence, its prejudicial effect on the minds of the jurors could not have been removed by an instruction of the court attempting to confine its effect to discrediting the testimony of the defendant. After a most careful examination of the evidence, we are not prepared to say that the defendant would have been convicted had not the court erred in admitting the evidence in regard to the Marshall girl.

It is urged by counsel for the state that it would be difficult to find a case more revolting than this, and well-nigh impossible

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to find a subject who belonged to a lower stratum of humanity than the defendant, and that society ought to be protected from defendant, and from the demoralizing and corrupting effects of a retrial of this case. The defendant is presumed to be innocent until he is proven guilty according to the established rules of law. And, if one is convicted in violation of these rules, his conviction is illegal, and on proper application will be set aside. The law is sufficient to protect society. If it is not, the remedy is in the hands of the law-making power. Under our criminal laws, no judgment of conviction can be set aside because of any technical errors or defects which do not affect the substantial rights of the defendant. But, when errors are made that do affect the substantial rights of a defendant (as was done in this case), the judgment must be set aside, and a new trial granted. It was prejudicial error to compel the defendant to testify in regard to the alleged occurrence with the Marshall child, and prejudicial error to admit any evidence whatever in regard thereto.

The court struck from an instruction asked by the defendant the sentence, "And no matter how slight that doubt may be, as long as it is reasonable, and based fairly upon the evidence, you should acquit," which is assigned as error. The court was asked by that instruction to define or gauge the degree to which a jury must be convinced in order to justify a verdict of guilty. We know of no formula to which a court may resort for that purpose, and we think all attempts to establish such have resulted in failure. (Wells on Law and Fact, sec. 579.) There was no error in striking from the instruction the above-quoted sentence.

As the case must be sent back for further proceedings, we will call attention to the fact that, as the person upon whom the alleged rape was committed is shown to have been ten years of age, she was incapable of consenting to the act; so any evidence of the character or reputation or acts of the girl showing want of chastity is wholly irrelevant and immaterial, and should not have been admitted. The judgment is reversed, and the cause remanded for further proceedings in accordance with the views expressed herein.

Huston and Quarles, JJ., concur.

Argument for Appellant.

(January 5, 1899.)

WILSON v. BOISE CITY.

[55 Pac. 887.]

DIVERTING WATER OF A NATURAL STREAM—LIABILITY OF CITY.—The waters of a natural stream flowed through the city, crossing ten streets therein, and, during high waters, flooded the streets, injuring them to the damage of the city. To avoid such injury, the city constructed an artificial canal, and diverted the waters of said stream therein; the canal was not of size sufficient to convey the waters of said stream, and overflowed and injured plaintiff's lands. *Held*, that the city was liable to plaintiff in damages, in being beneficially interested in the change of the course of a natural stream, and negligent in not constructing the canal of size sufficient to carry the waters of said stream at all times and in quantities that might be reasonably anticipated.

GRANT OF POWER—AUTHORITY.—A grant of power carries with it authority to do those things necessary to the exercise of the power granted.

ARTIFICIAL WATERWAY—MUST BE KEPT IN REPAIR BY PARTY CONSTRUCTING IT.—One who purchases land and improves the same on the line of an artificial waterway constructed by a municipal corporation may well rely upon such municipal corporation to perform the duty that it is under, of keeping such artificial waterway in repair and condition to carry all of the waters that may flow therein from usual and ordinary causes, and may recover damages received by the negligent flooding of his lands by waters from such artificial waterway.

(Syllabus by the court.)

APPEAL from District Court, Ada County.

C. C. Cavanah, for Appellant

The appellant contends that Boise City, a municipal corporation, derives its powers and authority under and by virtue of a special charter, and that there is no provision therein granting to Boise City or the officers thereof authority, or making it the duty of said city, to construct and maintain this artificial channel. That the acts of the mayor and common council of Boise City in the construction and maintenance of said artificial channel were and are *ultra vires*, null and void. Taking the po-

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sition which we are contending for, that the mayor and common council of Boise City were not authorized by law to construct and maintain this artificial channel, the rule is well settled that if an act from which an injury results be wholly beyond the powers conferred on a municipal corporation, the latter cannot be held responsible in damages for the doing of it. In support of this proposition we submit the following authorities: *Col-lins v. Mayor etc.*, 69 Ga. 544; *Cavanaugh v. Boston*, 139 Mass. 426, 52 Am. Rep. 716, 1 N. E. 834; *Field v. Des Moines*, 39 Iowa, 575, 18 Am. Rep. 46; *Harvey v. Rochester*, 35 Barb. 177; *Smith v. Rochester*, 76 N. Y. 506; *Thayer v. Boston*, 19 Pick. 511, 31 Am. Dec. 157; Dillon on Municipal Corporations, 4th ed., 1181, 1183. A ratification of the unauthorized and illegal acts of the officers or agents of a municipality cannot make the municipality liable. (*Hodges v. Buffalo*, 2 Denio, 110; *Boam v. Utica*, 2 Barb. 104; *William v. Rockland*, 52 Me. 118.) We maintain that it is fundamental that in order to say that a municipal corporation is liable in damages by reason of an act of its officers, the corporation or its officers must be engaged in the performance of a corporate duty devolved by law upon the corporation, and is not liable when engaged in the performance of a public service for the general welfare of the inhabitants of the community. (*Kuehn v. Milwaukee*, 92 Wis. 263, 65 N. W. 1030; *Mayor etc. of Huntsville v. Ewing*, 116 Ala. 576, 22 South. 984; *Mayor of Albany v. Cuncliff*, 2 N. Y. 165.) The universal rule laid down by the courts and text-writers is, that where a municipal corporation or its officers have used reasonable and ordinary care in the construction and maintenance of a public work, the corporation is not responsible for damages caused by freshets and storms. (*Carr v. Northern Liberties*, 35 Pa. St., 324, 78 Am. Dec. 342; *Diamond Match Co. v. New Haven*, 55 Conn. 525, 3 Am. St. Rep. 70, 13 Atl. 409; *Mayor etc. of Huntsville v. Ewing*, 116 Ala. 576, 22 South. 984; *Rockwood v. Wilson*, 11 Cush. 221; *Steinmeyer v. St. Louis*, 3 Mo. App. 256.)

Hawley & Puckett, for Respondents.

The city constructs a sewer system and extends its main drainage line one mile beyond the limits of the city and dumps

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the sewage upon the premises of another to his damage. Under the contention of the appellant herein the city would not be liable, as the acts of the mayor and common council would be *ultra vires*, the point of dumping being without the city limits. The authorities all hold that in a case like the above the city would be liable. (*Chapman v. Rochester*, 110 N. Y. 273, 6 Am. St. Rep. 366, 18 N. E. 88, 1 L. R. A. 296, and numerous cases therein cited.) It was the duty of the city when it constructed the new channel to have constructed it of sufficient size to carry off the waters that might reasonably be expected to flow down and into such channel. (*Spangler v. San Francisco*, 84 Cal. 12, 18 Am. St. Rep. 158, 23 Pac. 1091; *Mayor v. Baley*, 2 Denio, 440, 441; *Powers v. Council Bluffs*, 50 Iowa, 197.) If the mayor and common council had the power to construct the new channel, then we contend that there can be no question but what the city is liable in this action. (*Rose v. St. Charles*, 49 Mo. 510; *Imler v. Springfield*, 55 Mo. 126, 17 Am. Rep. 645; *Bams v. Hannibal*, 71 Mo. 449; *Mayor v. Thompson*, 29 Ark. 569; *Flagg v. Worcester*, 13 Gray, 601; *Gaued v. Booth*, 66 N. Y. 62; *Vanderweile v. Taylor*, 65 N. Y. 341.) Good faith and honest exercise of judgment are no defense in an action for damages caused by inadequate artificial waterway. (*Perry v. Worcester*, 6 Gray, 544, 66 Am. Dec. 431, and note.)

Action by plaintiffs to recover damages caused by flooding their lands by waters from an artificial canal constructed by the defendant. Judgment for plaintiffs for \$500 and costs of action. A motion for a new trial was denied. Defendant appeals from the order denying a new trial, and from the judgment. On the trial, the following stipulation of facts was made, which constitutes the evidence in the cause, to wit: "The above-named parties hereby agree upon the following statement of facts, and submit the same to the court for the determination of the points in controversy: The facts agreed upon, in addition to the facts admitted in the pleadings, are as follows: That Cottonwood creek is a stream tributary to Boise river, and rises in a range of mountains that extends along the northerly side of Boise City. That the natural channel of said stream enters said limits of Boise City, and runs southwesterly through the

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limits of Boise City, a distance of more than one mile. That the said natural channel of said stream through the limits of Boise City was, before moving the same, varying feet in width and in depth. That, at times of high water in said stream, and of freshets, at the time said stream ran through said city limits in its natural channel, said waters ran at times outside and over said natural channel, and upon the land adjoining said natural channel, and the natural channel was at said times of high water insufficient to carry the waters of said stream. When the same ran through Boise City, it crossed ten streets. That, during the low-water season of each year, the authorities of Boise City could have, by making artificial channels along the streets, controlled the waters of said stream, so as not to have been an obstruction to said streets, or to have interfered with or prevented the proper cleaning or repairing thereof, but could not, during seasons of high water, have prevented such water obstructing the streets crossed by said stream, or of its interfering or preventing the proper cleaning and repair thereof. That, in high-water seasons, the fact of the water flowing out of the regular channel and over the adjacent lands would tend to cause sickness amongst the inhabitants of said Boise City. That, during the high-water seasons of said Cottonwood creek, which occurred only in the springs of 1892, 1894, and 1897, since the construction of said flume, the same being caused by freshets, storms, and warm winds melting the snow in the mountains at the head of said stream, said waters overflowed the walls, cut the banks of said flume out, and flowed upon the adjacent lands. That the mayor and common council of Boise City, for the purpose of preventing and allowing said stream from running in its natural channel through the limits of Boise City, did, in the year 1891, change the course of said stream from its natural course, and forced it to flow in an artificial channel, easterly from the city limits of Boise City, and outside of said city limits of the defendant. That, in said year 1891, the mayor and common council of Boise City did, by contract, cause to be constructed said artificial channel or flume herein, out of rock, cement, and lime, and extending from the point where said Cottonwood creek enters Boise valley, outside of said limits of the de-

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fendant, from the range of mountains along and without the city limits of Boise City, to the said Boise river. That said artificial waterway or flume runs between the westerly line of said real estate of plaintiffs and the easterly boundary line of said Boise City. That said artificial channel or flume was constructed in manner as follows: That the materials out of which said flume is made are pieces of rock, varying in width and thickness from six inches to four feet, and lined inside in places with lime and cement. That the size of said flume is five feet in height, three feet in width at the bottom, and the walls have a slant of forty-five degrees, making about eight feet distant across from top wall to wall. That the walls of said flume are two feet in thickness, banked up on the outside with gravel and earth, said banks being about three to six feet in thickness. That the average grade of said flume, from where said waters leave the mountains at the mouth of said flume, to Boise river, is about thirty feet. That the average depth of water which runs through said flume, except the high-water seasons of 1892, 1894, and 1897, is about two and a half to three feet. That the mayor and common council of Boise City at the time of the construction of said flume, and subsequent to said time, have built permanent stone dams—one about five hundred feet from the head of said flume, and also one near the head or mouth of said flume—for the purpose of retaining and preventing the sand and gravel from flowing into said flume from said Cottonwood creek. That, ever since the construction of said flume, the same has been used for the purpose of carrying the waters of said Cottonwood creek, where the same leaves said mountains, to Boise river, and that the same has been cared for and maintained by the mayor and common council. That in the month of May, 1897, there came on a high stage of water in Cottonwood creek, which was caused by freshets, winds, and storms, and filled up said flume and water-way with a large volume of water, thereby overflowing the same. That said premises of plaintiffs are situate about two hundred feet from the nearest point where said waters overflowed said flume during said month of May, 1897. That said waters, after overflowing said flume, ran in and upon the premises of plaintiffs, and deposited thereon sand and gravel,

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and undermined the said wall on the southerly side thereof, and broke and weakened said wall, and washed away some of the soil of said premises, and injured the house situate thereon, to plaintiffs' damage \$500. That said mayor and common council of Boise City have, ever since the construction of said artificial channel or flume, in the spring months of each year, entered into contract with private persons to clean out, repair, and place in good condition said flume. That the amounts spent by the mayor and common council of Boise City upon said flume, in order to keep the same in good condition, were from \$400 to \$500 each year. That said defendant does not derive any revenue in its corporate capacity from said flume. That, at the time that the waters of said Cottonwood creek, to wit, in the month of May, 1897, flooded over said flume and ran in and upon the premises of said plaintiffs, the mayor and common council of the defendant did employ about fifteen men to assist the street commissioner of Boise City in preventing the waters from flooding out of said flume. At said time, the street commissioner of said defendant and his assistants, to wit, about fifteen men, went to said flume aforesaid with shovels, other tools and sacks of sand, placing said sacks of sand along the top of said walls of said flume, and worked until said waters ceased overflowing said flume, and running upon the premises of said plaintiffs. That, subsequent to the construction of said artificial channel or flume of Cottonwood creek by said mayor and common council of Boise City, to wit, in the year 1891, said plaintiffs purchased said premises herein referred to, and had constructed thereon said wall and dwelling-house mentioned in said second amended complaint herein, and that said plaintiffs knew of the existence, course, and condition of said flume or artificial channel at the time of purchasing and constructing said house and wall. That no legal proceedings have, prior to this suit, been brought by said plaintiffs, or anyone in their behalf, to compel the removal of said flume, or to abate it, nor has anyone given the defendant notice to abate or remove said artificial channel or flume aforesaid."

QUARLES, J. (After Stating the Facts).—It is contended by the counsel for the defendant, who is the appellant here, that

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the action of the mayor and common council in constructing the artificial channel or flume in question is *ultra vires*. That said mayor and common council had no authority to go outside of the city limits to construct such flume. That in doing so they were not performing a duty, but rendering a beneficial service to the state, and must be regarded as the agents, not of the defendant, but of the state. Section 5 of the charter of Boise City provides what powers may be exercised by the mayor and common council, "within Boise City," and grants, among numerous other powers, the power to secure the protection of persons and property therein; to provide for the health, cleanliness, ornament, peace, and good order of the city; to remove nuisances; to provide for the prevention and removal of all obstructions from the streets, cross-walks, and sidewalks, and for cleaning and repairing the same. To remove a nuisance from the city, it sometimes happens that its officers or agents, or someone for it, must necessarily go outside of the city limits. To protect the health of the city, it becomes necessary to construct sewers, running through the city, and emptying at some point outside of and lower down than the city. The power to provide for the health and cleanliness of the city grants power to the mayor and common council to cause sewers to be constructed to carry the waste from and outside of the city, and authorizes the mayor and common council to cause such sewers to be constructed to such points outside of the city as may be necessary in order to rid the city entirely of said waste. In order to protect the streets of said city, to protect the property and the health of its citizens, it appears from the record in this case that it was necessary to construct the artificial channel in question. A grant of power carries with it authority to do those things necessary to the exercise of the power granted. The mayor and common council, in constructing said channel, were exercising a power conferred upon them by said city charter. Now, having acted within the scope of the powers granted by the city charter, the defendant must take care of the said artificial channel, and of the waters which naturally flow in Cottonwood creek, whether during the summer and fall seasons, when such waters are at a low stage, or during the spring thaws, when the said stream is naturally swollen from

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melting snows in the mountains. As a part of the common history of the country, we know that more snow falls some seasons than falls others, and that there is more water in said creek during the spring thaws in some years than there is in other years. The record before us shows that during the freshets, or spring thaws, during some of the years since its construction, said artificial channel, on account of its not being large enough, did not and could not carry all of the waters of said stream, causing the flooding of adjacent lands. Of course, the city has no control over the elements, and is not responsible for loss occasioned by the act of God, or by the acts of the common enemy; yet, having constructed such artificial channel, and having diverted said stream from its natural channel, it is under a legal obligation to take care of said artificial channel, and of the waters that naturally flow in said stream, at all seasons. If the damage complained of had occurred through and by means of a cloudburst, or unusual and unprecedented storm, the defendant, not being in fault, would not be responsible. But the injury complained of was caused by said artificial channel being too small to carry the waters of said stream during the spring high waters, and which water was the natural result of usual and ordinary causes, and the defendant is responsible, because it is the fault of said defendant that said artificial channel is not large enough.

The authorities agree that a city is not responsible for the acts of its police and health officers. And the weight of authority is to the effect that, when a city or town is charged by statute with the duty of appointing certain officers, whose mission is to perform services beneficial to the public, and from whose services the municipality derives no profit, the municipality is not liable for the negligence of such officers. But that rule has no application here. There is no command in the defendant's charter directing it to change the natural course of Cottonwood creek. The changing of the channel of said stream was not for the benefit of the general public, but for the benefit of the defendant and its inhabitants. The municipality was directly benefited. By such change it was saved the expense and trouble of controlling the waters of said stream within the city limits, and it avoided the injury which naturally resulted

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from the overflowing and flooding of its streets in times of high water. By the express provisions of its charter, the control of its streets is vested in the mayor and common council. Now, to exercise this power, to protect said streets from the injury caused them by flooding, and to save expense to the municipality, the mayor and common council caused said artificial channel to be constructed. In doing this, they were performing a duty, acting within the scope of their powers, and not merely performing a voluntary service to the general public. It is not consonant with reason or the rules of law to say that, if a stream runs through land owned by A, he can protect his property by constructing an artificial channel, and turning the waters of such stream upon his neighbors' lands, to their injury, and not be liable to them. In the case at bar, the defendant, for its benefit, has done this thing. Having changed the channel of said stream, and caused the waters thereof to flow where they did not, and would not, flow by nature, it must keep such artificial channel in condition to carry the waters diverted by it, in high as well as low water seasons, and protect the property of residents upon and near such artificial channel, or respond in damages to the parties injured. If the acts of the mayor and common council which caused the injury complained of consisted in attempting to confine the waters of said stream to the natural channel thereof, to save the property of adjacent owners, and its streets, it would not, of course, be responsible. In the case at bar, if the waters of said stream had not been diverted from their natural course, the plaintiffs' property would not have been injured, but the waters which injured their property would have injured the inhabitants of Boise City, and its streets. It is contrary to natural justice to say, as to the injury complained of, which was caused by the defendant, for its financial benefit, to protect its streets and save it expense, that the plaintiffs, innocent parties, must suffer their loss in silence, and the defendant, though the gainer, is under no obligation to compensate plaintiffs for their loss. The rule applicable to this case is correctly given by Judge Cooley in his work on *Torts* (first edition), at page 586, where, after giving the rule applicable between private persons, he says: "All the foregoing principles are as much ap-

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plicable to municipal corporations, in their dealings with water-courses, as to individuals. Thus, if a town shall so erect a bridge as that the natural and probable consequence shall be to raise the water on the lands above, by the partial obstruction interposed to its flow, the town will be liable, as an individual would for a like obstruction." And, at page 621, he says: "But municipal corporations are responsible for due care in the execution of any work ordered by them, and, if the work is one for the special benefit of its own people, it must not negligently be allowed to get out of repair, to the injury of individuals." And, in a note on the same page, the author says: "Thus, a city is liable if one of its drains or sewers is suffered to become obstructed, whereby the lands of individuals are flooded." And, at page 625, the learned author says: "It is a principle of nearly universal acceptance in this country, when a town is incorporated, and is given control over the streets and walks within its corporate limits, and is empowered to provide the means to make and repair them, that the corporation not only assumes this duty, but by implication agrees to perform it, for the benefit and protection of all who may have occasion to make use of these public easements; and that, for any failure in the discharge of this duty, the corporation is responsible to the party injured." In the case at bar, the charter of the defendant, with the amendments thereto, at the times mentioned in the stipulation of facts, gave the defendant control over its streets, and empowered it to provide means to make, repair, and protect them, and to move obstructions from them. To do so it was necessary to construct the artificial channel in question. The defendant assumed this duty. By assuming this duty, and by accepting the power granted by the charter, under which it acted, its liability to construct and keep the artificial channel in question of such capacity that it would carry the waters of Cottonwood creek, without damage to the owners of property in its vicinity, is implied. (See *Shearman and Redfield on Negligence*, 4th ed., secs. 255, 281; *New York etc. Lumber Co. v. City of Brooklyn*, 71 N. Y. 580.) In *Anthony v. Inhabitants of Adams*, 1 Met. (Mass.) 284, the court says: "We can have no doubt that an action upon the case will lie

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against municipal corporations, when such corporations are in the execution of powers conferred on them, or in the performance of duties required of them by law, and their officers, servants, and agents shall perform their acts so carelessly, unskillfully, or improperly as to cause damage to others." In *Welsh v. Village of Rutland*, 56 Vt. 228, 48 Am. Rep. 762, the court recognizes the rule that a municipality is responsible for the negligent exercise of powers granted, and cites the following instances: The construction and maintenance of waterworks, of ditches or drains, of bridges or culverts, and structures which obstruct the flow of natural watercourses, and of public works—and then adds: "If a plan adopted for public works must necessarily cause injury or peril to private persons or property, though executed with due care and skill, the law regards the execution of such a plan as negligence." In *Maxmilian v. Mayor etc. of New York*, 62 N. Y. 160, 20 Am. Rep. 468, the plaintiff's ancestor was killed by being negligently run over by an ambulance wagon driven by an employee of the commissioners of public charities, and the court held that the city was not the principal of the employee of the commissioners. The decision rested upon two grounds—one, that the relation of principal and agent did not exist between the defendant city and the ambulance driver, the other ground being that the defendant, in its corporate capacity received no benefit whatever from the service rendered by the commissioners of public charities. The case is, so far as both the grounds named are concerned, unlike the case at bar, and that the decision is not applicable as authority here. The weight of authority is to the effect that, when a duty devolves upon a municipality which is ministerial in its nature, the municipality is liable for injuries received through a negligent discharge of such duty, or through failure to perform such duty. In *Dillon on Municipal Corporations*, fourth edition, section 1048, it is said: "It is agreed that, whenever the duty as respects drains and sewers ceases to be legislative or judicial or quasi judicial, and become ministerial, then, although there be no statute giving the action, municipal corpo-

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ration is liable, to the same extent and on the same principles, as a private person or corporation would be under like circumstances for the neglect or the negligent omission to discharge such duty, resulting in an injury to others." And, in the foot-note to said section, the learned author illustrates the distinction between a judicial and ministerial act in the following language: "A corporation may be said to act judicially in selecting and adopting a plan on which a public work shall be constructed; yet, as soon as it begins to carry out that plan, it acts ministerially, and is bound to see that the work is done in a reasonably safe and skillful manner." (Dillon on Municipal Corporations, secs. 980, 983, 1048.) In the case before us, a condition confronted the defendant city. Its streets were being overflowed and damaged by the waters of a natural stream flowing through its boundaries. The presence of the said natural stream obstructed its streets at times, endangered the health of its inhabitants, and was a source of expense and annoyance. To meet this condition, and avoid its consequent evils, the mayor and common council, in fact, the municipality itself, decide to change the course of said natural stream by building an artificial channel sufficient to carry the waters of said stream therein. Thus far the act was quasi judicial. But, when it came to carrying out this plan, the acts were ministerial. It became the duty of the defendant to construct said artificial channel of sufficient permanency, strength, and size to carry all of the waters of said stream, and for its failure to discharge this duty, it is responsible to anyone injured by such failure. (*Perry v. City of Worcester*, 6 Gray, 544, 66 Am. Dec. 431, and note; *Powers v. City of Council Bluffs*, 50 Iowa, 197; *Spangler v. San Francisco*, 84 Cal. 12, 18 Am. St. Rep. 158, 23 Pac. 1091; *Mayor etc. v. Bailey*, 2 Denio, 433. See notes to *Chapman v. City of Rochester* (N. Y. App.), 1 L. R. A. 226.) In the opinion of that case, speaking of the pollution of the stream to the injury of plaintiff, caused by sewage conveyed to said stream by a sewer, constructed by the defendant, the court says: "The filth of the city does not flow naturally to the lands of the plaintiff, as surface water finds its level, but is carried thither by arti-

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ficial arrangements prepared by the city, and for which it is responsible." In the case at bar the waters of Cottonwood creek do not flow naturally to the lands of the plaintiffs, but are "carried thither by artificial arrangements prepared by the city, and for which it is responsible."

It is urged by the appellant that the evidence is not sufficient to support the judgment. It is one of the facts stipulated that during the high-water seasons of 1892, 1894, and 1897, the artificial channel in question would not carry the waters of said stream, and the same was overflowed, and the adjacent lands flooded. It is not agreed that during the springs of said years the flooding of said artificial channel was the result of any cause, other than the natural and ordinary cause which came from the breaking up of winter and the introduction of spring, and there was no evidence offered by the defendant to show that the injury complained of resulted from any unusual cause which could not be reasonably anticipated. If the said injury was the result of unavoidable casualty, or the result of conditions which are unusual and could not be reasonably anticipated, the existence of such conditions would be a defense, but such defense should be pleaded and proven. We think the evidence sufficient to support the judgment. The natural and reasonable inference from the agreed statement of facts is that the artificial channel in question is not large enough to carry the waters of Cottonwood creek during the spring seasons. This fact was demonstrated the next spring following its construction, showing that it was negligently made too small. Having actual notice that said artificial channel was not large enough to carry the waters diverted by the defendant, soon after its construction, the defendant has negligently omitted to enlarge the same, and, now that innocent parties have suffered, seeks to avoid liability, principally on the ground that the action of the mayor and common council in constructing said artificial channel and diverting said stream, being outside of the city, is *ultra vires*. But it is urged that the plaintiffs, having bought the land in question after the construction of said artificial channel, are estopped from recovering by such notice. We do not think so. The plaintiffs were

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justified in relying upon the defendant to perform its duty by taking care of the waters which it had diverted from a natural stream. It was the duty of the defendant to protect all of the property along the line of said artificial channel, not only for the benefit of the persons who owned such property at the time of the construction of such artificial channel, but also for the benefit of their successors in interest. In the case of *Arave v. Canal Co.*, 5 Idaho, 68, 46 Pac. 1024, this court, speaking through Mr. Justice Huston, said: "Appellants' contention that the plaintiff was guilty of contributory negligence in erecting his house and other improvements, when they were liable to be damaged by the canal of the defendant, subsequently constructed, is not maintainable. . . . The maxim, 'So use your own property as not to injure the rights of another,' applies as well to corporations as to individuals. Appellants' claim that the corporation defendant is not called upon to consider or inspect the rights of settlers along the line of its canal, who have made such settlement subsequent to the location of the canal, is not only unsupported by law, but is repugnant to every principle of equity and good conscience." The material facts set forth in the stipulation of the parties were pleaded in the amended complaint. The defendant filed a general demurrer to said amended complaint, which demurrer was overruled by the district court, properly, we think, as said amended complaint states a cause of action. Counsel for appellant has spent much time in research, and made a strong and able argument for the city, but it does not convince us that the judgment appealed from was erroneous. Judgment affirmed, with costs to the respondents.

Huston, C. J., and Sullivan, J., concur.

Argument for Appellant.

(January 11, 1899.)

FIDELITY SAVINGS ASSOCIATION v. SHEA.

[55 Pac. 1022.]

BUILDING AND LOAN ASSOCIATIONS.—Where the borrower subscribes for shares in a loan association merely to obtain a loan, and is required to make monthly payments upon such shares, and by the terms of the contract the “maturity of the shares” extinguished the debt and cancels the stock, the borrower is a stockholder in fiction and not in fact, and the actual relation between the parties is only that of creditor and debtor.

RELATION OF PARTIES.—A contract of loan, in which the debtor agrees to pay monthly six dollars, which is applicable to the satisfaction of the principal debt, and seven dollars and fifteen cents interest monthly, upon the debt of \$650, until the entire debt is paid, is equivalent to an interest charge of twenty-six and two-fifths per cent per annum, upon the principal of the loan, average time, and is usurious.

USURY.—Under the laws of Idaho, building and loan associations cannot charge, directly or indirectly, usurious interest on loans.

SAME—EVASION OF USURY LAWS.—One who comes into Idaho and loans money upon real estate there situated cannot evade and defeat the usury laws of the state by stipulating in the contract of loan that the contract shall be tested, and its validity determined by the laws of another state, such stipulation being against public policy, and not binding upon the debtor.

SAME—ATTORNEY FEE.—In a suit upon a usurious contract, it is error to allow the plaintiff under the stipulations of a mortgage securing the debt an attorney fee, as such fee is no part of the debt. (Syllabus by the court.)

APPEAL from District Court, Bannock County.

C. A. Warner and Wyman & Wyman, for Appellant.

A payment upon a collateral is not a payment on the debt. (Endlich on Building Associations, 2d ed., sec. 477; *Philadelphia Mer. Loan Assn. v. Moore*, 47 Pa. St. 233.) There is nothing unfair or illegal about the contract. The interest and premium which is to be applied as interest on the note only amounts to thirteen dollars and twenty cents per year on each \$100, or thirteen and one-fifth per cent per annum, which, at the time the

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contract was made, was not a usurious rate of interest. It is only when we destroy this fair, reasonable and legal contract, which the borrower has by refusing to let the stock payments be applied on the stock, as the writing says they shall be, and substitute for it another contract, which the parties never made, by applying the stock payments on the principal of the loan from month to month as they are made, that we make an unfair, illegal, or usurious contract. The lower court fell into the error of doing this, by construing the case of *Stevens v. Home Sav. etc. Assn.*, 5 Idaho, 739, 51 Pac. 779, 986, decided by this court, as so holding. The law is universal that stock payments are not payments on the loan from time to time as they are made. This principle of law is well stated in 4 Am. & Eng. Ency. of Law, 2d ed., 1057; *State v. Hornbacher*, 42 N. J. L. 635. In a building and loan association, payments on a stock are simply investments in stock, whether the shareholder be a borrower or not; hence the borrower and shareholder are separate and distinct in their relations, and a payment of dues upon stock is not, *ipso facto*, a payment on the member's loan. (*Post v. Mechanics' etc. Assn.*, 97 Tenn. 408, 37 S. W. 216; *Reeve v. Ladies' Bldg. Assn.*, 56 Ark. 335, 19 S. W. 917; *People's Bldg. etc. Assn. v. Furey*, 47 N. J. Eq. 410, 20 Atl. 890; *Tilley v. American Bldg. etc. Assn.*, 52 Fed. 622.) It has become a well-recognized doctrine that payments of dues upon the stock are not payments upon the mortgage debt, and do not, *ipso facto*, work an extinguishment of so much of the mortgage, and hence they are not to be regarded as partial payments, and that therefore a statutory rule for computing interest on partial payments is inapplicable to them. (Endlich on Building Associations, 1st ed., sec. 452; Endlich on Building Associations, 2d ed., sec. 477; *Overby v. Fayetteville etc. Assn.*, 81 N. C. 56; *North America Bldg. Assn. v. Sutton*, 35 Pa. St. 463, 78 Am. Dec. 349.) Fines are not interest and cannot be construed to be interest upon interest. This question has been before the court and definitely settled. They are held to be "liquidated damages agreed to be paid for the nonperformance of a promise or covenant." (*Shannon v. Howard Mut.*

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Bldg. Assn., 36 Md. 382; *Ocmulgee Bldg. etc. Assn. v. Thompson*, 52 Ga. 427; *Goodman v. Durant Bldg. etc. Assn.*, 71 Miss. 310, 14 South. 146; *Hughes Bros. Mfg. Co. v. Conyers*, 36 South. 1093.)

S. C. Winters, for Respondent.

Plaintiff requires the borrower to subscribe for stock in order to get a loan. Then it charges interest, premium, dues and fines. The interest and the premium are both interest, and the fines are compound interest, which makes the whole contract usurious, and the action was brought prematurely. (*Stevens v. Home Sav. etc. Assn.*, 5 Idaho, 739, 51 Pac. 779-896; *Vermont Loan Assn. v. Hoffman*, 5 Idaho, 376, 49 Pac. 314; Idaho Rev. Stats., secs. 1263-1266; *Vermont Loan etc. Co. v. Tetzlaff*, ante, p. 105, 53 Pac. 104.) The maxim that "He who seeks equity must do equity" fully applies in the case at bar. It principally applies to a party who is seeking relief in the character of plaintiff in the court. If the borrower of money upon usurious interest seeks to have the aid of court of equity in canceling, or procuring the instrument to be delivered up, the court will not interfere in his favor, unless upon the terms that he will pay the lender what is really due him. But if the lender comes into court to assert and enforce his own claim under the instrument, there the borrower may show that the contract is usurious and have the action dismissed without paying anything to the lender; as a court of equity will never assist a wrongdoer in effectuating his wrongful or illegal purpose. (1 Story's Equity Jurisprudence, Red. ed., sec. 64; *Hawkins v. Pearson*, 96 Ala. 369, 11 South. 304.)

Action by the Fidelity Savings Association against Patrick E. Shea, and others, to foreclose a mortgage securing payment on a loan. Judgment for defendants, and plaintiff appeals. Modified.

The plaintiff, a Colorado corporation, received the following application: "Application for Shares. No. of Certificate, 14-122. Dated July —, 1896. Office of the Fidelity Savings Association. Home Office, Denver, Colorado. Name, P. E.

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Shea; occupation, boilermaker; P. O. address, Pocatello; street and number, Fourth ave.; county, Bannock; state, Idaho. I hereby apply for membership in the Fidelity Savings Association, and subscribe for stock, subject to the by-laws, rules, and regulations of said association, to the amount and of the class specified, viz., twelve shares at \$100.00 per share, of monthly payment stock, amounting at maturity to \$1,200. Agents are authorized to collect the first two payments of fifty cents on each \$100 share, or, if subscription is made direct to the home office, the first payment must be remitted by bank check or draft, postal, or express money order. No agent is authorized to promise any specific loan. I understand that no agent has power to make any representation binding upon the association, other than authorized by the by-laws and literature issued by the association, or by letter of authority issued under the hand of the president, secretary, or manager of the association, and that the shares cannot be withdrawn until after twelve payments have been made, and that, if withdrawn before maturity, the association will reserve two dollars and fifty cents (\$2.50) per share, and such sum, if any, as may be set aside by the board of directors, not exceeding one per cent per annum of par value of the shares, for the purpose of meeting any contingency that may arise, as provided by the stock certificate. And, whereas, the law of Colorado requires that a majority of all stock in force be voted at every legal election of the shareholders: Now, therefore, to prevent a failure of election in the event of my absence or neglect to send a proxy, I appoint J. S. Wolfe, 1st, E. M. Johnson, 2d, or E. H. Webb, 3d, as my proxy. Send certificate to ——. Signature of Applicant: P. E. Shea."

Pursuant to said application, the following certificate of stock was issued: "No. 14,122. Monthly payment stock. \$1,200. The Fidelity Savings Association, Denver, Colorado. Be it known that P. E. Shea, of Pocatello, county of Bannock, state of Idaho, is the holder of twelve shares, of the face value of twelve hundred dollars, of the participating capital stock of the Fidelity Savings Association, and a member thereof. The

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conditions of this membership are as follows: First. The shareholder agrees to pay the association fifty (50) cents per month on every one hundred (\$100) dollars of face value of this certificate the last day of every month, commencing with the next month after the date of this certificate; provided that the holder may, at his option, after three months from the date hereof, make larger payments than herein required; and provided further, that if there shall be paid hereon in the aggregate the sum of forty-five (\$45) per share at the end of four years after the date of this certificate, or at any earlier period, then no further payments need be made, and on request the secretary of the association shall, on presentation of the certificate, certify the same as fully paid up, except, however, that, if these shares are pledged as collateral to a loan, regular payments shall be made until maturity, unless waived by the board of directors of the association at a regular meeting. No notice of payments shall be required from the association. A failure to make payments when due will subject the stock to a fine of ten (10) cents per share each month during delinquency. Second. Should the holder hereof, by reason of sickness, loss of income, or other reason, be unable to make the payments due hereon, the pass-book, issued with this stock, may be presented or sent to the secretary of the association, with request that the stock be suspended for any period not exceeding six months at one time, which suspension shall be plainly marked in the pass-book by the secretary, and returned to the member; and during the period of suspension the stock shall not be subject to fine, nor share in the profits of the association; provided, that no stock can be suspended, if pledged as collateral to a loan, without the consent of the directors of the association. Third. These shares may be withdrawn, after twelve payments have been made, by giving thirty days' notice in writing, and surrendering this certificate and the accompanying pass-book; and the holder will be paid all money received, with interest at six per cent per annum, if withdrawn before maturity, or with full profits if carried to maturity, less fines, if any, and less a reserve fee of \$2.50 per share, and provided,

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if the board of directors deem it necessary to meet any contingency, less a further sum of one per cent per annum on the par value of these shares; provided that the holder or assigns may renew the said shares within twelve months after withdrawal, and receive credit thereon for an amount equal to the reserve fee retained; provided, further, that shareholders in the aggregate can only withdraw during any month an amount equal to one-half of the receipts of the association for that month without the consent of the board of directors. Fourth. Should members die, their personal representatives may surrender the shares at any time, if they shall elect to do so, and receive the full amount credited to such shares; or, if said shares shall not be surrendered, they may remain in force, for the benefit of the estate, by payment of regular dues. Fifth. These shares may be transferred at any time, subject to a lien of the association, for any unpaid balance due from the holder, by returning the certificate to the secretary for transfer on the books of the association, and in no other manner. Sixth. This, the certificate giving the terms and conditions of these shares, the by-laws, and the application for membership, constitute the contract; provided, further, that all executed papers connected with any loan form part of the contract. Seventh. Agents of this association have no authority to promise loans, or change any of the conditions of this contract. Given under the seal of the Fidelity Savings Association, and under the hand of its president and secretary, at Denver, Colorado, this twenty-seventh day of July, A. D. 1896. M. B. Johnson, President. [Seal] G. D. Campbell, Secretary."

And to secure the loan evidenced by said contract the respondents executed a mortgage, bearing date July 27, 1896, upon lots 3, 4, and 5, in block 322 in the town of Pocatello, county of Bannock, state of Idaho. Appellant, by averment, pleaded *in haec verba*, certain statutes of the state of Colorado relating to building and loan associations, and also the by-laws of the appellant corporation. The contract evidencing the loan, which is set forth at length in the complaint, is as follows: "\$650.00. Denver, Col., July 27th, 1896. On or before ten years after date, I promise to pay to the Fidelity Sav-

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ings Association, a corporation formed and existing under and by virtue of the laws of the state of Colorado, at its principal office, in Denver, Colorado, the sum of six hundred and fifty (\$650.00) dollars, with interest thereon at the rate of six per cent per annum, together with the monthly premium on said sum, of sixty cents on every one hundred dollars thereof; interest and premium being payable monthly in advance, on the last day of each and every month, until this note is fully paid. This note is given in consideration of a loan made by the payee to the maker hereof, who is a member of said association, and the holder of twelve M. P. shares of stock in said association, evidenced by the certificate No. 14,122, which are hereby assigned as collateral to the said loan. Said loan has been granted to and accepted by me as a member of said association, and with special reference to the laws of the state of Colorado for a construction of the contract hereby made. Now, therefore, the maker hereof covenants and agrees to pay the interest and premium upon said sum, and the monthly payments upon said shares, promptly, as the same become due and payable, in installments of not less than thirteen and fifteen one-hundredths (\$13.15) dollars per month, payable in advance on the last day of each month, commencing with date, and thereafter, until at the maturity of said shares the proceeds thereof shall be applied to repay the loan. If any interest or premium evidenced by this note, or monthly payments upon the shares herein described, shall remain unpaid for sixty days after the same becomes due and payable, then the principal sum, as evidenced hereby, may at once, without notice, become due and payable, at the option of said association; and the withdrawal value of said collateral shares may, at the option of said association, be thereupon credited upon any balance due the association from said shareholder, as said association may elect. And, if any payment evidenced hereby is not paid when due, fines shall be added as provided by the by-laws of the Fidelity Savings Association aforesaid, together with all costs of collection, including an attorney's fee of ten per cent if collected by an attorney, foreclosure proceedings, or by suit at law. [Signed] Patrick E. Shea, Mary E. Shea."

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The mortgage provided that the appellant might keep the property insured, and pay the taxes thereon and it is so averred in the complaint, wherein it is averred that plaintiff paid insurance in the sum of four and one-half dollars, May 13, 1897, and October 15, 1897, the further sum of four and one-half dollars; that defendant neglected to pay the taxes on the mortgaged property, and appellant paid, July 15, 1897, taxes duly assessed on said property for the year 1897 in the sum of thirty-one dollars and fifty-six cents. The mortgage provided for attorney's fees in case of its foreclosure. Defendants made payments on said loan contract aggregating the sum of fifty-three dollars and thirty cents. The defendants demurred to the complaint, which demurrer was overruled. Findings of fact were made in accordance with the allegations of the complaint and the documentary evidence, and judgment foreclosing the mortgage for \$696.26, without costs; the sum found due the plaintiff being the principal of the loan, less fifty-three dollars and thirty cents payments thereon, nine dollars insurance paid, thirty-one dollars and fifty-six cents taxes paid, and fifty-nine dollars attorney's fee allowed. This appeal is from the judgment, and on the judgment-roll.

QUARLES, J. (After Stating the Facts.)—Owing to the importance of this case, we have given the lengthy and very able argument of the appellant more than ordinary attention. But, after a careful and studious consideration in the record before us, we have arrived at the conclusion that it is to be regarded as coming within the rule laid down in the following cases, to wit: *Stevens v. Association*, 5 Idaho, 739, 51 Pac. 779; *Mills v. Association*, 75 N. C. 292; *Association v. Wilcox*, 24 Conn. 147; *Association v. Blackburn*, 48 Iowa, 385; *Gordon v. Association*, 12 Bush, 110, 23 Am. Rep. 713; *Association v. Graham*, 7 Neb. 173. A careful consideration of the contract of loan, in connection with the entire record in this case, convinces us that the entire transaction is one of loan, that the issuance of shares to the borrower is a matter of fiction, and that part of the monthly payment which is called "monthly payments upon shares" is merely a trick, artifice, or subterfuge for the purpose of extorting from the debtor a usurious rate

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of interest. As evidence of the correctness of our conclusion, we quote from the brief of appellant the following language: "In the case at bar, P. E. Shea was carrying twelve shares of stock, but had a loan of only \$650. Had respondent, P. E. Shea, carried out his contract, by continuing payment until the stock was fully paid, there would have been with appellant association, to the credit of P. E. Shea, \$1,200. He would have been indebted to the association, on his note, \$650. Of the \$1,200 to his credit, \$650 would have been applied to the cancellation of his indebtedness, and the balance of \$550 would have been paid to him in cash, or, if not drawn by him, as he had the right to do, would have remained with the association, and continued to draw dividends." In other words, the borrower, although paying for the stock, does not become the owner of it, but, after paying the face value of it, he is entitled to what? The cancellation of his note, and the return to himself of \$550. The object of the respondents was solely to obtain a loan of \$650. To do this they would, in the event suggested by the appellant, have made two hundred payments of thirteen dollars and fifteen cents each, amounting to the sum of \$2,630, of which the appellant would have appropriated \$1,430 as interest and "premiums" on the loan, and out of which the debtor, a fictitious shareholder (but who was never in fact a shareholder), would be entitled to the return of \$550. Viewed in the light of appellant's construction, the contract is unconscionable. It is conceded by the appellant that the three dollars and ninety cents monthly premium is purely interest, but appellant claims that the interest collected monthly, seven dollars and fifteen cents, amounts to the rate of thirteen and one-fifth per cent per annum on the loan, and is lawful interest; being less than the rate authorized by statute at the time of making the contract, and which might have been contracted for by stipulation. We would agree with this contention if the monthly payment consisted of the interest only, but it does not. In addition to collecting the interest on the entire amount of the loan, the appellant has exacted a monthly payment of six dollars upon the principal of the loan itself, so that the

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amount of the principal debt is being reduced monthly, but the creditor, notwithstanding, is collecting interest on the entire amount. The subterfuge of calling payment of the principal of the loan by the term "maturing stock" does not change the nature of the payment. So long as the debtor does not become the owner of the stock, but the "maturity of the stock" extinguishes the debt, whereupon the lender cancels the stock, courts are not justified in holding that the transaction is other than that of loan; but it is the duty of the court to hold such transaction to be one of loan, and subject to the usury laws of the state. Now, suppose the certificate had called for six and one-half shares of stock, no other change being in the contract. To satisfy his note, the defendant would be compelled, if he did so entirely by the monthly payments therein stipulated to be made, to make one hundred and eight payments of thirteen dollars and fifteen cents each, and one of four dollars and thirty-eight and one-third cents; requiring, say for convenience, nine years. His debt would then be paid. But he would be paying in the principal from time to time, and, while continually returning the sum borrowed, he would be paying thirteen and one-fifth per cent interest per annum on the whole sum. He would not have the use of the \$650 borrowed during the nine years. In fact, the average time that he would have it would only be four and one-half years; and, instead of paying thirteen and one-fifth per cent per annum, he would in fact have paid twenty-six and two-fifths per cent per annum. Or, instead of averaging the time that he would have the use of the money, average the amount that he would have during the entire time, and it would be \$325 for nine years. He would have paid one hundred and eight and one-third interest payments of seven dollars and fifteen cents each, or in all \$774.58, or interest at the rate of twenty-six and two-fifths per cent per annum—a usurious rate of interest. Under the guise of collecting "dues" on "stock," the appellant would have collected the amount of the loan and interest thereon at the rate of twenty-six and two-fifths per cent per annum. If the interest should be computed by the rule of partial payments that obtains, the rate would be found to be more than twenty-six and two-fifths per cent

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per annum. It seems strange that men will resort to so many schemes to oppress and extort unconscionable gains from their fellow-men, who by reason of poverty or misfortune are compelled to borrow money. We are told in Holy Writ: "For whosoever hath, to him shall be given; and whosoever hath not, from him shall be taken even that which he seemeth to have." The record of this case shows that the appellant association has acted upon this idea. It requires a great degree of intelligence, much sharpness, and keen shrewdness, to devise means and schemes to rob the unwary and unsuspecting debtor by extorting from him high rates of usurious interest under the semblance of living without the usury laws; yet such shrewdness is always accompanied by an absence of moral integrity or common honesty which does not appeal very strongly to the judge who is sitting in the capacity of chancellor, and whose duty it is to follow the law in administering equity. There is no provision in chapter 11 of title 4 of our Civil Code that authorizes a building and loan association to extort from its debtors usurious rates of interest.

It is contended by the appellant that in the contract in this case are to be found two distinct contracts; i. e., one subscribing for stock, and one borrowing money, resulting in two relations between the parties; that is, corporation and stockholder in one instance, and debtor and creditor in the other. We do not concede this contention, but we do concede that the relation between the corporation and its stockholders is distinct from that between it and its debtors, be they stockholders or not. In the case at bar, we construe the entire contract to be one of loan; that it was entered into for the purpose solely of borrowing money by one of the parties, and lending by the other; that the relation of corporation and stockholder exists, not in fact, but purely in fiction; and that the object of the plaintiff in entering into the contract was purely for the purpose of increasing its capital by obtaining large returns for the use of its money. In no case where the two relations are blended together, as in this case, and the stock and debt are both contemporaneously extinguished by monthly payments upon the debt or upon the so-called stock, will the contract be

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treated by this court other than a contract of loan. We reaffirm the rules enunciated by this court in *Stevens v. Association*, 5 Idaho 739, 51 Pac. 779, and heartily commend what was said by the supreme court of North Carolina in *Mills v. Association*, 75 N. C. 292.

But it is contended by the appellant that the contract before us is a Colorado contract, and to be construed under, and its validity determined by, the laws of Colorado, it being so stipulated in the contract. It is true that under the statutes of Colorado which are set forth in the complaint, and tested by such statutes, the contract in question is not usurious. But under our statutes it is usurious. The by-laws of the plaintiff provide that no loan shall be made, except upon real estate security, and that the loan shall not exceed fifty per cent of the value of the security. If the appellant desires the contract in question enforced under and by the provisions of the statutes of Colorado, it must proceed to do so in Colorado. That stipulation in the contract relating to the Colorado statutes is not binding upon the respondents, nor upon the state, nor upon the courts of this state. If this was an action *in personam*, the rule might be different. But, to foreclose the mortgage in question, resort must be had to the courts of this state. Inserting the provision in the contract that the contract should be construed by the statutes of Colorado is mere subterfuge, resorted to for the purpose of evading and defeating the usury laws of this state, and such as this court will not enforce, it being contrary to public policy. When parties come into this state, whether artificial or natural persons, and loan money to a citizen of this state upon real estate security situated here, they must expect to have the validity of the contract determined by the laws of this state. (See *Trust Co. v. Hoffman* (decided by this court), 5 Idaho, 376, 49 Pac. 314.)

The trial court erred in allowing an attorney fee to plaintiff, as such fee is no part of the debt, but extraordinary costs, and as such cannot be recovered, under the provisions of section 1266 of the Revised Statutes.

The respondents contend that the principal debt was not due when this action was commenced, and that the judgment should

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be reversed on that ground. There is nothing in this contention. The distinction between this case and the case of *Trust Co. v. Hoffman*, *supra*, in this respect, is marked. In the latter case, coupon notes were given for the interest falling due annually, while the principal debt fell due five years after date; and the provision in the mortgage as to maturity was that, if either of the interest notes should not be paid at maturity, the debt should become due. We held that, as the interest coupon notes by their terms provided for compound interest in advance, the said coupon interest notes were void. Those notes, being void, could not mature, and the principal notes by their terms were not due. In the case at bar, the contract provides for monthly payments of thirteen dollars and fifteen cents. The stipulation as to said payments is not void, the true question being as to their application. We hold that they must be applied upon the principal debt. Notwithstanding that, the appellant was entitled to said monthly payments; and, under the terms of the contract, it might elect to treat the entire debt as due, if the respondents should fail to make any of such monthly payments for sixty days. Respondents failed for more than sixty days to make one of such payments, and the appellant treated the debt as due. The action was not prematurely brought.

The judgment appealed from is modified by deducting therefrom the attorney fee of fifty-nine dollars allowed by the trial court, which sum the district court is directed to have credited upon the said judgment as of the date of the entry thereof, and the said judgment as so modified is affirmed. Costs of this appeal awarded to the respondents.

Huston, C. J., and Sullivan, J., concur.

ON REHEARING.

(February 2, 1899.)

Per CURIAM.—Appellant has filed a lengthy petition for rehearing, consisting of fifty-four printed pages, which, outside of the statement of general principles of law not applicable to Idaho, Vol. 6—27

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the case, is remarkable only for poetical effusion and psychological erudition. So far as the particular case at bar is concerned, it calls our attention to no new principle of law or question of fact that was not carefully considered by this court on original hearing. Since reading the petition, we are more than ever convinced that the true nature of the entire transaction is correctly shown in the quotation in the original opinion from the appellant's brief, and are more firmly convinced of the duty and propriety of applying the usury laws to such transactions. Courts should not seek excuses by which associations that loan money, whether they claim to be acting solely upon benevolent principles or not, may, by the use of subterfuge, be exempted from the ordinary penalty of violations of the usury statutes. In its labored efforts to convince this court of its disinterested philanthropy in the part which it took in the transaction in question, in its petition for rehearing, *inter alia*, it says: "On the other hand, he never pays the principal, that being canceled by his shares." This brief quotation emphasizes the fact that the issuing of shares to respondents, and the alleged relation of shareholder by the respondents to the appellant, is mere subterfuge in order to permit the appellant to collect a usurious rate of interest. We are fully convinced that the conclusion reached in this cause is correct in law, and sanctioned by the principles of equity. A rehearing is denied.

(January 14, 1899.)

PEOPLE EX REL. ATTORNEY GENERAL v. ALTURAS
COUNTY.

[55 Pac. 1067.]

COUNTIES—RECOGNITION OF—ESTOPPEL.—The state, having, through each of its co-ordinate branches of government, repeatedly recognized Blaine county as a county and legal subdivision of the state, is estopped, after the lapse of nearly four years, from questioning the regularity of the passage of the act creating the county.

Argument for Appellants.

SAME.—Act creating county will not be inquired into after recognition for four years. The legislature, by an act approved March 5, 1895, established the county of Blaine; the legislature thereafter, in four different acts, recognized the existence of Blaine county as a legal subdivision of the state; the supreme court of the state held the acts creating Blaine county to be valid; its existence was repeatedly recognized by the executive department; the people residing within the territory embraced within Blaine county repeatedly recognized the existence of the county; *held*, general elections therein, participated in by the electors, generally elected county and precinct officers, levied and collected taxes, assumed debts of its predecessors, funded a large indebtedness, brought suits as a county against other counties, and recovered large sums, and exercised all the powers and functions of a county government for a period of nearly four years. *Held*, that under such circumstances, the court would decline to examine into the manner of the passage of the act creating the county.

(Syllabus by the court.)

APPEAL from District Court, Bannock County.

Kingsbury & Parsons and Johnson & Johnson. for Appellants.

Not only has the creation, organization and existence of Blaine county been repeatedly recognized and declared by the judiciary, but its recognition by the other co-ordinate departments of the state government has been no less unequivocal and explicit. The legislative department, by an act approved March 9, 1895, to provide for the annexation of a part of Blaine county to Custer county (Laws 1885, p. 141), a statute unimpeached and unimpeachable here, recognized Blaine county as one of the existing counties of the state, with the organization, duties and liabilities attendant upon such public *quasi* corporations. For nearly four years all these obligations and duties, involving the administration of justice, the levy of taxes, the collection and payment of the county's portion of the state revenue, the support of the common schools, the building and improvement of roads and bridges, the support of paupers and the various other governmental functions that our statutes impose upon the political subdivisions of the state, have been imposed upon and performed by Blaine county. (*Speir v. Board of Commissioners*, 88 Fed. 762; *People v. Maynard*, 15

Argument for Respondent.

Mich. 463; *State v. City of Des Moines*, 96 Iowa, 521, 59 Am. St. Rep. 381, 65 N. W. 818, 822, 824; *State v. Leatherman*, 38 Ark. 81; *Rumsey v. People*, 19 N. Y. 41; *Lanning v. Carpenter*, 20 N. Y. 447; *Van Valkenburgh v. Milwaukee*, 43 Wis. 582.) In construing statutes and the constitution, the rule is almost universal to adhere to the doctrine of *stare decisis*. (*Evans v. Job*, 8 Nev. 34; *Multnomah County v. Sliker*, 10 Or. 66; *Shreve v. Cheesman*, 69 Fed. 791; Black on Interpretation of Laws, 34; *People v. Supervisors of Benzine Co.*, 34 Mich. 211; *People v. Treasurer of Benzine Co.*, 41 Mich. 6; *Kneeland v. Milwaukee*, 15 Wis. 522.) It is a principle of law that where a county has a *de facto* existence (and this fact is alleged in the complaint herein), that recognition and long acquiescence in the existence of the county estops the state from denying its *de jure* existence. Every branch of the government of the state has recognized Blaine as a county of Idaho: The legislature by three separate acts: the judicial by many decisions and opinions besides those above mentioned. (*Bingham Co. v. Bannock Co.*, 5 Idaho, 627, 51 Pac. 769; *Blaine Co. v. Lincoln Co.*, ante, p. 57, 52 Pac. 165; *Blaine Co. v. Smith*, 5 Idaho, 255, 48 Pac. 286; *Osborn v. Ravenscraft*, 5 Idaho, 612, 51 Pac. 618; *Ravenscraft v. Board of Commrs.*, 5 Idaho, 178, 47 Pac. 943.)

Arthur Brown, for Respondent.

It is undoubtedly true that mere irregularities in an organization under a valid law may possibly be cured by delay, but unconstitutionality never can. If an act is unconstitutional in its incipency, it is null and void. It never can be made valid; each day of delay was only a fresh usurpation. (19 Am. & Eng. Ency. of Law, "Quo Warranto," p. 672; *People v. Stanford*, 77 Cal. 360, 18 Pac. 85, 19 Pac. 693; *People v. Reclamation District No. 136*, 121 Cal. 522, 50 Pac. 1069, 53 Pac. 1085; *Commonwealth v. Allen*, 128 Mass. 310; *State v. Crow Wing Co. Commrs.*, 66 Minn. 519, 68 N. W. 767, 69 N. W. 925, 73 N. W. 631, 35 L. R. A. 745; *Attorney General v. Marr*, 55 Mich. 445, 21 N. W. 883; *St. Louis etc. R. R. Co. v. Belleville*, 122 Ill. 383, 12 N. E. 680; *United States v. Insley*,

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130 U. S. 263, 9 Sup. Ct. Rep. 485; *United States v. Beebe*, 127 U. S. 338, 8 Sup. Ct. Rep. 1083.) To constitute *res judicata* there must have been a judgment of the exact issue by a court of competent jurisdiction upon the exact point involved in certain cases sought to be estopped. It must have been upon an issue found; that point must have been necessary to the decision. It must be between the same parties; in other words, to constitute an estoppel here a suit must have been between the state of Idaho on one side, as represented by its attorney general, and the county of Blaine on the other, and the question must have been involved as to the constitutionality of the creation of Blaine county, and the court must have decided that, and that must have been necessary to the decision. (*Johnson v. Powers*, 139 U. S. 157, 11 Sup. Ct. Rep. 525; *Bedon v. Davie*, 144 U. S. 143, 12 Sup. Ct. Rep. 665; *Wixson v. Devine*, 67 Cal. 341, 7 Pac. 776.)

QUARLES, J.—This action, in the nature of *quo warranto*, was commenced in the name of the state *ex rel.* attorney general, to recover judgment excluding the defendant, Blaine county, from exercising the rights, privileges, and powers of municipal government within the boundaries fixed by the act creating the county. The two questions raised by the record are these: Was the act of March 5, 1895, creating Blaine county, prohibited by the provisions of article 18 of the constitution? Was said act passed in the manner prescribed by the provisions of article 3 of the constitution?

The first of these questions was answered by this court in the decision in the case of *Blaine Co. v. Heard*, August 4, 1896, reported in 5 Idaho, 6, 45 Pac. 890, where the court, speaking through its present chief justice, said: "Notwithstanding this case, in all its salient points, has been heretofore presented and considered by us, in view of its importance we have again gone carefully over the case as presented in the briefs and arguments of the counsel, and are convinced that the contention of the appellant cannot be sustained, and that the acts of the legislative assembly of Idaho (Sess. Laws 1895, pp. 32, 170) establishing the counties of Blaine and Lincoln are valid and constitutional laws." It will thus be seen that more than two

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years ago this court held said act to be constitutional. Since then the people of these two counties, doubtless relying on the judgment of both the legislative and judicial branches of government, have acted on the theory that said act was valid; and the former decision of this court, having been acted upon by the people, who have adjusted the business matters of the county, funded old indebtedness, and created new, should not be disturbed at this late day. No good would be accomplished by overruling that decision, but much evil and confusion would result therefrom. Whether that decision was right or not, public policy and sound legal principles demand that we now adhere to it, and regard that question as a sealed book, which is no longer open to public scrutiny.

But it is argued that the manner of the passage of said act was not considered by the court in *Blaine Co. v. Heard*, *supra*, and that that question is now open, and should be determined in this case. If the regularity of the passage of that act had been attacked in the case of *Blaine Co. v. Heard*, the decision would have been upon the same lines as the decision in *Cohn v. Kingsley*, 5 Idaho, 416, 49 Pac. 985. But that question was not raised in the *Heard* case, or in any other case that has come before this court. We feel that it is our duty, under the circumstances of this case, taking into consideration the nature of the act in question, the long-continued acquiescence in and recognition of the validity of said act, both by the state and by the people residing in the defendant county, to hold that the state is now estopped from questioning the regularity of the passage of the act in question. The legislature has recognized the validity of the act in question in at least four different bills which have been introduced and apparently enacted into law since its passage. At the regular elections in 1896 and 1898, men have been elected by the people of Blaine county to represent "Blaine county" in both houses of our state legislature, and the senators and representatives so elected have been received and recognized in the legislature as legal representatives of Blaine county. In fact, Blaine county, through its senators and representatives, has participated in conducting and carrying on the state government itself, and has been permitted to do so by the state government, through its different

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branches, without question. Then the defendant county has been recognized as a valid subsisting county by the courts of this state in divers actions, notably the following cases: *Wright v. Kelly*, 4 Idaho, 624, 43 Pac. 565; *Blaine Co. v. Heard*, 5 Idaho, 6, 45 Pac. 890; *Bellevue Water Co. v. Stockslager*, 4 Idaho, 636, 43 Pac. 568; *Ravenscraft v. Board*, 5 Idaho, 178, 47 Pac. 942; *Blaine Co. v. Smith*, 5 Idaho, 255, 48 Pac. 286; *Osborn v. Ravenscraft*, 5 Idaho, 612, 51 Pac. 618; *Bingham Co. v. Bannock Co.*, 5 Idaho, 627, 51 Pac. 769; *Blaine Co. v. Lincoln Co.*, ante, p. 57, 52 Pac. 165. The defendant county has adjusted its business matters, funded a large indebtedness inherited by it from other counties, and has sued, as a county, other counties, and recovered large sums of money. Its existence having been recognized by every department of the state government, and it having been invited and encouraged to act in its municipal capacity, and having acted in such capacity, in the matters suggested, public policy and sound principles of law require that the state now be held estopped from questioning the manner of the passage of the act in question. (*People v. Maynard*, 15 Mich. 463; *Rumsey v. People*, 19 N. Y. 41; *Mitchell v. Campbell*, 19 Or. 198, 24 Pac. 455; *Speer v. Board*, 88 Fed. 762; *State v. City of Des Moines*, 96 Iowa, 521, 59 Am. St. Rep. 381, 65 N. W. 818; *Jameson v. People*, 16 Ill. 257, 63 Am. Dec. 304; Cooley's Constitutional Limitations, 4th ed., 312.)

It is unnecessary to cite further authority or adduce further argument showing why the state should be now held estopped from questioning the legal existence of Blaine county. We do not desire to be regarded as announcing the rule that a legislative act which is void at the time of its passage, because not passed in the manner required by the constitution, can ripen into a valid act by the mere lapse of time. The conclusion in this case is based upon a rule of estoppel, demanded in this case by public policy. The act in question is different from an ordinary act of legislation, and should not be held subject to the same rules, under the conditions surrounding this case. The judgment of the district court is reversed, and the cause remanded, with instructions to sustain the defendants' de-

Argument for Appellant.

murrer to the complaint, and enter judgment in favor of the defendants, dismissing the action. Costs awarded neither party.

Huston, C. J., concurs.

Sullivan, J., while sitting at the hearing, took no part in the decision.

(January 16, 1899.

MOULTON v. WILLIAMS.

[55 Pac. 1019.]

MORTGAGE—FORECLOSURE.—A mortgage given to secure the payment of a note is a mere incident to the note, and its foreclosure is not bound so long as an action upon the note is not bound.

ACKNOWLEDGMENT OF DEBT—LIMITATIONS.—An indorsement upon a note, secured by mortgage, acknowledging the debt evidenced by the note, signed by the maker, who is also the mortgagor does not create, extend or renew either the principal obligation or the mortgage, and is not void under section 3351 of the Revised Statutes, as such acknowledgment affects the remedy on the note and mortgage, and not the contract or obligation thereof.

(Syllabus by the court.)

APPEAL from District Court, Blaine County.

R. F. Buller and Lyttleton Price, for Appellant.

It was conceded that this deed passed the title of Anderson to the premises, and the only questions are whether the unacknowledged and unrecorded indorsements on the note and mortgage are effective to prevent the bar of the statute of limitations as against a subsequent intervening *bona fide* purchaser without actual notice, and also whether the said indorsements extended the note for five years and four months or only for five years. (Rev. Stats., secs. 2990, 3001, 3002, 3004, 3357, 3377; *Chamberlain v. Bell*, 7 Cal. 293, 68 Am. Dec. 260.) A mere creditor is not protected by the recording acts. But that a judgment creditor purchasing at his own sale is protected is well settled. (*Hunter v. Watson*, 12 Cal.

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363, 73 Am. Dec. 543; *Pixley v. Higgins*, 15 Cal. 127; *Foorman v. Wallace*, 75 Cal. 552, 17 Pac. 680.) No agreement on the part of Moulton to wait ninety days in consideration of the new promise was shown; hence his right of action was not suspended and there was nothing to interrupt the running of the statute of limitations, and the suit would be barred in five years from the date of the new promise. (*McCormick v. Brown*, 36 Cal. 180, 95 Am. Dec. 180; 2 Daniel on Negotiable Instruments, secs. 1316-1325; Angell on Limitations, 5th ed., p. 34, sec. 42, p. 303, sec. 287.

Texas Angel, for Respondent.

In our state it has been held that a renewal of the note renews the mortgage. (*Kelly v. Leachman*, 3 Idaho, 629, 33 Pac. 44; *Laws v. Spence*, 5 Idaho, 244, 48 Pac. 282.) The record of the mortgage gives notice to all subsequent purchasers and encumbrancers in good faith, inasmuch as it puts all parties upon inquiry as to the true status of the debt between the debtor and creditor. (*Murdock v. Waterman*, 145 N. Y. 66, 39 N. E. 829; *Hughes v. Edwards*, 9 Wheat. 489; *Lint v. Morrill*, 25 Cal. 498.) The statutory bar would not occur until five years after the expiration of the extended time. (*Shepherd v. Thompson*, 122 U. S. 231, 7 Sup. Ct. Rep. 1229; *Randon v. Toby*, 11 How. 493.) The appellant was a judgment creditor, and purchased the property at its own sale and credited the purchase price on the judgment. In such a case it cannot claim to be a *bona fide* purchaser. (*Pettingill v. Moss*, 3 Minn. 222, 74 Am. Dec. 747; *Caldwell v. Walters*, 18 Pa. St. 79, 55 Am. Dec. 592; *Wilhoit v. Lyons*, 98 Cal. 409, 33 Pac. 325; Freeman on Executions, secs. 316, 335.)

Action by George B. Moulton against George A. Williams, administrator of Volney S. Anderson, deceased, and others. Judgment for plaintiff, and said administrator and the First National Bank of Hailey appeal. Affirmed.

Suit was brought by the plaintiff to foreclose a mortgage given to secure a note dated March 30, 1885, due October 1, 1885, to plaintiff by V. S. Anderson. September 19, 1890, the following indorsement was made upon the note, and also upon the mortgage, to wit: "I hereby acknowledge the within note,

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and renew the same, and promise and agree to pay the same within four months from this nineteenth day of September, 1890. V. S. Anderson." V. S. Anderson died March 21, 1894, intestate, being then a resident of Alturas county, now Blaine county. January 3, 1895, the appellant George A. Williams was, by letters of administration on that day issued, appointed administrator of the estate of said deceased. October 25, 1890, the appellant the First National Bank of Hailey obtained a judgment against said Anderson, and on July 17, 1893, under execution issued upon said judgment, the mortgaged property in controversy was sold, and purchased by said bank, which, on January 31, 1894, obtained a sheriff's deed therefor. This action was commenced against the appellants by the mortgagee to foreclose the mortgage, November 21, 1895. Plaintiff waived all recourse against the estate of Anderson, and elected to look to the mortgage security alone for his debt. The court found all of the facts in favor of the plaintiff, and rendered judgment of foreclosure, from which certain defendants appealed.

QUARLES, J. (After Stating the Facts.)—The indorsement upon the note and mortgage in controversy, while called a "renewal," is merely an acknowledgment or new promise to pay the debt, and therefore evidence of a waiver of the bar of the statutes of limitation. The plea of the statute is a personal one, and therefore may be waived, either in an action commenced, where failure to plead it waives it, or it may be waived by the debtor by writing, under the provisions of section 4078 of the Revised Statutes, which is as follows: "No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby." The effect of said acknowledgment was to remove the bar, and to furnish, under the statute, "sufficient evidence" to "take the case out of the operation" of our limitation statutes, and start anew the running of the bar of the statute. Said indorsement did not make a debt. It did not renew the debt. It did not extend, add to, or take from the debt. It simply waived the bar of the statute. It affected the remedy alone. Much of the

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misapprehension that exists as to the effect of statutes of limitation arises from the neglect of lawyers and judges to distinguish between the obligations of contracts and the remedy or right to enforce such obligations, or to recover damages for their nonperformance. The indorsement on the note in question did not create any new obligation on the part of the debtor, but it took the case out of the operation of the statute, or removed the bar of the statute up to the making of same; in other words, it affected not the debt, but the remedy thereon. What is said in regard to the principal obligation is also applicable to the mortgage. The mortgage is an incident to the debt. It follows the debt, is collateral to it, and stands or falls with the debt. So long as the creditor is entitled to a judgment for the debt evidenced by his note, so long he may, generally, be entitled to enforce the security given to secure its payment. (*Kelly v. Leachman*, 3 Idaho, 629, 33 Pac. 44; *Law v. Spence*, 5 Idaho, 244, 48 Pac. 282.) If, by our statutes, the security was extinguished by the lapse of a time certain, its life limited by statute, regardless of whether the remedy on the principal object was lost by reason of the bar of the statute or not, as is the case in California, the rule would be otherwise. The life of the mortgage is not limited in this state. It never ceased to exist; therefore it has not been renewed. It secures the same debt, and hypothecates the same property, in the same form, for the same purpose, and to the same effect as when originally given; therefore the mortgage has not been extended. Section 3351 of the Revised Statutes, has no application to this case. That section applies to the instrument itself, not to the remedy of the mortgagee. (*Willows v. Rosenstein*, 5 Idaho, 305, 48 Pac. 1067.) Under the statute, *supra*, the lien of the mortgage cannot be extended beyond its terms so as to secure a debt not named in the mortgage, or to hypothecate property not named in the mortgage, except by writing acknowledged as required in case of a conveyance of real property.

The appellants contend that the action was barred by the running of the statute even after the written indorsement of acknowledgment. That acknowledgment was made September 19, 1890. The mortgagor and debtor died March 21, 1894.

Points decided.

The appellant Williams was appointed administrator of said deceased by letters issued to him by the proper probate court on January 3, 1895. This action was commenced November 21, 1895, within one year, and was authorized by the provisions of section 4071 of the Revised Statutes. It is unnecessary to decide whether the indorsement on the note and mortgage waived the running of the statute for the next ensuing four months from its date, in addition to the time fixed by the statute in which the action might be brought, and we do not pass on that question. The original record of the mortgage gave the appellant bank constructive notice of its existence, and placed it upon inquiry as to the real facts. It was charged with notice that the debtor might waive the bar of the statute. Before levying upon and selling the mortgaged property, it should have inquired into the fact as to the running of the bar of the statute or waiver of the same. The lien of the mortgage exists in this case as against the heirs and legal representative of the deceased mortgagor, and, as the appellant bank has not shown any title by prescription to the mortgaged property, the lien exists as against it. The judgment appealed from is affirmed, with costs to respondents.

Huston, C. J., and Sullivan, J., concur.

(January 20, 1899.)

STATE v. WEBB.

[55 Pac. 892.]

INDICTMENT.—Objections to indictment considered and overruled.

ROBBERY—CROSS-EXAMINATION.—In the trial of a criminal action, as in this case a charge of robbery, the defendant should be permitted, upon cross-examination of prosecuting witness, to interrogate such witness as to any matters connected with the transaction.

EVIDENCE.—Where it appeared from the evidence that the defendant, the prosecuting witness, and others, had been together drinking from 10 o'clock in the evening until 5 o'clock in the morning, when the robbery was alleged to have taken place, the prosecution upon

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the trial having confined their examination of the prosecuting witness to the first meeting of said witness, and the defendant, and to the occurrences at the time of the alleged robbery, leaving an interim of some seven hours, during which it seems the parties were continually together, unexplained. It was error to refuse to permit the defense to interrogate the prosecuting witness, as to his acts and whereabouts during such interim.

INSTRUCTIONS.—Where instructions are conflicting and irreconcilable they are erroneous.

ALIBI—BURDEN OF ESTABLISHING.—Where a defendant relies upon the defense of an *alibi*, the burden of establishing such defense is upon the defendant, and if the defendant succeeds, by competent evidence, in establishing a reasonable doubt in the minds of the jury as to his presence at the time and place when and where the offense was committed, when the committing of the offense by him made his presence imperative, he is entitled to an acquittal. The character and extent of the evidence requisite to create such doubt is matter for the jury.

(Syllabus by the court.)

APPEAL from District Court, Shoshone County.

James E. Fulton and Wallace N. Morphy, for Appellant.

The court erred in overruling the demurrer of the defendant to the indictment. The indictment in this cause is insufficient and defective in the following particulars: (a) It is indefinite and uncertain as to the time of the alleged robbery, in that it alleges it to have been "on or about the twenty-sixth day of October, A. D. 1897." The averment as to the time of the commission of an offense must be of a date certain prior to the filing of the indictment. (*Commonwealth v. Adams*, 4 Gray (Mass.), 27; *Commonwealth v. Keefe*, 9 Gray (Mass.), 290; *State v. Temple*, 38 Vt. 37; *State v. Jackson*, 39 Me. 291; *Jane v. State*, 3 Mo. 61; *State v. Hayes*, 24 Mo. 358; *People v. Wallace*, 9 Cal. 31; *Morgan v. State*, 13 Fla. 671; 1 Green Cr. Rep. 361.) (b) The indictment should, but does not, allege an intent or purpose to rob or steal from the person of the said Fred Gagnon. Intent or purpose to steal is essential, and cannot be inferred as a legal presumption. This intent must be specifically and directly averred as a part of the description of the offense. (*Holt v. Territory*, 4 Okla. 76, 43 Pac. 1083; *Chappell v. State*, 52 Ala. 359; *State v. Dolan*, 17 Wash. 499,

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50 Pac. 472; *Blanton v. State*, 1 Wash. 265, 24 Pac. 433; Maxwell's Criminal Practice, 176-185; *Leonard v. Territory*, 2 Wash. Ter. 381, 7 Pac. 872; *State v. So Ho Ge*, 1 Wash. 275, 276, 24 Pac. 442, 443; *State v. McCormick*, 27 Iowa, 402; *Fouts v. State*, 4 G. Greene (Iowa), 500; *Wright v. Territory*, 5 Okla. 78, 47 Pac. 1069; *Fouts v. State*, 8 Ohio St. 98; *Kain v. State*, 8 Ohio St. 307; *Hagan v. State*, 10 Ohio St. 459; *Snyder v. State*, 59 Ind. 105; *Shaffer v. State*, 22 Neb. 557, 3 Am. St. Rep. 274, 35 N. W. 384; *State v. Brown*, 21 Kan. 38; *State v. Patrick*, 3 Wis. 709; *Morris v. State*, 13 Tex. App. 65; *State v. Hollyway*, 41 Iowa, 200, 20 Am. Rep. 586.) Under the American rule, it is held that a cross-examination is not limited to the very day and to the exact facts named in the direct examination, but may extend to other matters which limit, qualify or explain the facts stated in the direct examination or modifies the inference deducible therefrom, providing only that such matters are directly connected with the facts testified to in chief. (*Blake v. Powell*, 26 Kan. 320; *Haynes v. Ledyard*, 33 Mich. 319; *Wilson v. Wager*, 26 Mich. 452; *Thomas v. Miller*, 151 Pa. St. 482, 25 Atl. 127; *Mayer v. People*, 80 N. Y. 364; *People v. Dixon*, 94 Cal. 255, 29 Pac. 504; *Black v. Wabash R. R. Co.*, 111 Ill. 351, 53 Am. Rep. 628; *Carey v. Richmond*, 92 Ind. 259.) Where a witness in his direct testimony gives only a portion of a material transaction or conversation, it is the right of the party against whom he testifies to cross-examine him in detail concerning the omitted portion: (*State v. Adams*, 108 Mo. 208, 18 S. W. 1000; *Murray v. Great Western Ins. Co.*, 72 Hun, 282, 25 N. Y. Supp. 414; *Ah Doon v. Smith*, 25 Or. 89, 34 Pac. 1093; *Sayres v. Allen*, 25 Or. 211, 35 Pac. 254; *Currier v. Robinson*, 61 Vt. 196, 18 Atl. 147; *Weadock v. Kennedy*, 80 Wis. 449, 50 N. W. 393; *People v. Strong*, 30 Cal. 151; *People v. Smallman*, 55 Cal. 185; *Shackelford v. State*, 43 Tex. 138; *Addison v. State*, 48 Ala. 478; *Home Benefit Assn. v. Sargent*, 142 U. S. 691, 12 Sup. Ct. Rep. 332; *Eames v. Kaiser*, 142 U. S. 488, 12 Sup. Ct. Rep. 302; *Gilmer v. Higley*, 110 U. S. 47, 3 Sup. Ct. Rep. 471.) An instruction which authorizes the jury to consider matters foreign to the issue made by the indictment is erroneous. It has also been held that where the evidence

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makes out a case in favor of the plaintiff, but upon a different theory from that set up in the complaint, it will be error to give an instruction in conformity with the case made by the evidence. (*Johnson v. Fraser*, 2 Idaho, 404, 18 Pac. 48; *Territory v. Evans*, 2 Idaho, 425, 17 Pac. 139; *Terry v. Shicbly*, 64 Ind. 106; *Glass v. Gelvin*, 80 Mo. 297; *Capital Bank v. Armstrong*, 62 Mo. 59; *Moffat v. Conklin*, 35 Mo. 453; *Wade v. Hardy*, 75 Mo. 394; *Frederick v. Kinzer*, 17 Neb. 366, 22 N. W. 770; *Marx v. Schwartz*, 14 Or. 177, 12 Pac. 253; *Parker v. Marquis*, 64 Mo. 38.) It is a general rule of law that in criminal prosecutions the burden of proof never shifts, but as to all defenses which the evidence tends to establish, the burden rests upon the state throughout to establish defendant's guilt beyond a reasonable doubt. This rule of law applies as well to any distinct substantive defense which may be interposed by the accused to justify or excuse the act charged as to the case as made by the state. (*Gravely v. State*, 38 Neb. 871, 57 N. W. 751; 1 Greenleaf on Evidence, sec. 81, notes; 3 Greenleaf on Evidence, sec. 29, and note A; *People v. Riordon*, 117 N. Y. 71, 22 N. E. 455; *People v. Downs*, 123 N. Y. 558, 25 N. E. 988; *Tiffany v. Commonwealth*, 121 Pa. St. 165, 6 Am. St. Rep. 775, 15 Atl. 219; *Rudy v. Commonwealth*, 128 Pa. St. 500, 18 Atl. 344; *Commonwealth v. McKie*, 1 Gray, 61, 61 Am. Dec. 410; *People v. Coughlin*, 65 Mich. 704, 32 N. W. 905; *Lilienthal v. United States*, 97 U. S. 237; *Howard v. State*, 50 Ind. 190; 1 Bishop's Criminal Procedure, secs. 1048, 1051, 1066; 2 Bishop's Criminal Procedure, secs. 669, 673.) The evidence of an *alibi* is like any other evidence which tends to negative the guilt of the accused. Self-defense and insanity are regarded as affirmative defenses, but the rule of law is that if the evidence in the case raises in the mind of the jury a reasonable doubt as to whether or not the killing was done in self-defense, or as to whether the party was insane at the time, the accused should have the benefit of such doubt and be acquitted. (*Wright v. People*, 4 Neb. 407; *State v. Donahoe*, 78 Iowa, 486, 43 N. W. 297; *State v. Cross*, 68 Iowa, 180, 26 N. W. 62; *State v. Dillon*, 74 Iowa, 653, 38 N. W. 525; *Baker v. State*, 50 Neb. 202, 69 N. W. 749; *Ballard v. State*, 19 Neb. 609, 28 N. W. 271.)

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Samuel H. Hays, Attorney General, for the State.

As to the allegation of time the indictment is sufficiently certain. It alleges that "on or about the twenty-sixth day of October, A. D. 1897, and before the finding and filing of this indictment," defendant committed the offense. This allegation is sufficient. (*State v. Thompson*, 10 Mont. 549, 27 Pac. 349, and cases there cited; Rev. Stats., sec. 7682; *State v. Williams*, 13 Wash. 335, 43 Pac. 15; *Rema v. State*, 52 Neb. 375, 72 N. W. 474, and cases there cited; *State v. Hoover*, 31 Ark. 676.) The indictment in other respects is sufficient. (2 Bishop's Criminal Practice, 1st ed., sec. 945; *People v. Nelson*, 56 Cal. 77; *People v. Shuler*, 28 Cal. 490.) On the question of the cross-examination of witnesses and whether prejudicial error was committed, authorities are of comparatively little value, owing to the varying circumstances of different cases. The general rule is that the opportunity of cross-examining the opposing party's witness is of course a matter of right, but the latitude allowable is very largely within the discretion of the trial court, and an appellate court will not interfere unless the discretion is oppressively abused. (8 Ency. of Pl. & Pr. 109.) The first instruction standing alone, we contend, states the rule of law correctly, and the second instruction was too favorable to defendant. It is sustained by the following authorities: *Holley v. State*, 105 Ala. 100, 17 South. 102; *State v. Beasley*, 84 Iowa, 83, 50 N. W. 570; *Carriety v. People*, 107 Ill. 162; *State v. Hamilton*, 57 Iowa, 596, 11 N. W. 5; *State v. Northrup*, 48 Iowa, 587; *Pellum v. State*, 89 Ala. 28, 8 South. 83; Sackett's Instructions to Juries, 648.

HUSTON, C. J.—Defendant was convicted of the crime of robbery, from which judgment of conviction, and from the order denying his motion for a new trial, defendant appeals. Defendant makes eighteen assignments of error, as grounds for a reversal of the judgment. The first assignment of error is to the sufficiency of the indictment. Defendant demurred to the indictment upon the grounds: "1. That it does not substantially conform to the requirements of sections 7677-7679 of the Revised Statutes of Idaho; 2. That the facts stated in said indictment do not constitute a public offense." These ob-

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jections are elaborated at some length in the brief of counsel, but we are unable to agree with his contention. We think the demurrer was properly overruled. The second assignment of error is to the action of the trial court in sustaining the objection of the district attorney to certain questions propounded by counsel for the defense to the prosecuting witness Fred Gagnon. The prosecuting witness, the person upon whom the robbery was alleged to have been committed, had testified, in substance, "that he arrived in Wallace on the evening of October 25, 1897, at about half-past 9 o'clock; that he met one Foust in front of Daxon's saloon, on the sidewalk, about 10 o'clock; that, on the morning of the twenty-sixth day of October, A. D. 1897, he lost some money; that he lost it because the defendant, George G. Webb, and Theodore Foust took it away from him." Witness then describes the money he alleges was taken from him, being fifty-five dollars in all. Witness then proceeds to describe the manner in which said money was taken from him, as follows: He (witness) was on the bridge. Theodore Foust came up after him, and told him to take a walk uptown. That witness said no, and said to Foust that he was waiting for a train, and that he did not want to go uptown then. That Foust said, "Hell! Come on; let's take a walk." That he then walked out with him. That he walked out of the Klondike saloon, and then Foust said he was sick. That they went onto the bridge together, and Foust was leaning over the railing either vomiting or pretending to do so, and witness was standing by his side, with both hands in his pockets. That "he was caught under the neck, and thrown on his back, by the defendant." "That he saw defendant's face, and recognized him." That he called Foust to help him, but there was no answer. That Foust then held him down, and that defendant and Foust took the money from him while he was so held. That, after taking his money, defendant and Foust ran away. It seems, from the time witness Gagnon first met Foust, in front of Daxon's saloon, the witness, Foust, and several other parties were drinking together, at various saloons in the town. Upon the preliminary examination of defendant, Gagnon had testified as follows: "I got here on the stage from

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Murray. I went inside the saloon. I took a drink, and walked out. As soon as I got outside, I saw Theodore Foust, and shook hands with him. I told him to come inside the saloon, and take a drink. I told him to wait a minute for me. I went outside, and went to another saloon. I changed ten dollars, and gave him five dollars. We then stayed around together until I was robbed." The defense sought to show by the prosecuting witness where he was, and with whom, from 10 o'clock P. M. until 5 o'clock A. M., the time when he alleges he was robbed, and this the trial court refused to let him do. This was error. The defendant was entitled to rigid and thorough examination of this witness, "as to any facts stated in his direct examination or connected therewith, and in so doing may put leading questions." (Rev. Stats., sec. 6079, amended by Laws of 1889.) This witness was the party making the charge against the defendant. It would be a perversion of the rules of evidence, a denial of justice, to say that the defendant, in a case like this, must be confined, in his cross-examination of this witness, to his recital of what took place immediately at the time of the robbery, in face of the fact that it was already shown that the parties had been on friendly terms and drinking together throughout the night. No such rule is contemplated by or expressed in the statutes. The defendant was entitled to go into a searching examination of the witness Gagnon as to his whereabouts, his doings, and the company he was in, from the time he met defendant and Foust to the time of the robbery. To refuse it was a prejudicial error. The trial court permitted counsel for defendant to read all of the testimony cited above as having been given by the witness Gagnon on the preliminary examination, except the words, "We then stayed around together until I was robbed." Upon what principle of law this ruling is based we are unable to comprehend. It was error. What we have said covers the assignment of errors up to and including the seventh assignment. The eighth and ninth assignments of error are not well taken. There was no error in the instructions therein challenged. The tenth assignment is to the giving of the fifth instruction requested by the state, and in this instruction we find no error,

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except in the closing paragraph, where the court says: "The defendant has been examined as a witness upon his own behalf. This it is his right to be, and the jury will consider his testimony as they will that of any other witness examined before them. It is proper, however, for the jury to bear in mind the situation of the defendant, the manner in which he may be affected by your verdict, and the very grave interest he must feel in it; and it is proper for the jury to consider whether this position in interest may not affect his credibility or color his testimony." When a defendant goes upon the witness-stand in a criminal action, he occupies the same position as any other witness. He is subject to the same rules, and is entitled to the same immunities and protection, as any other witness. To send a defendant to the jury handicapped by such an instruction as this, especially the latter portion of it, is a vivid illustration of "keeping the word of promise to the ear, and breaking it to the hopes." We think the giving of the last paragraph of this instruction was error. (Thompson on Trials, sec. 2421, and cases cited in notes; *Buckley v. State*, 62 Miss. 705.) It is incumbent upon the state to establish the guilt of the defendant in a criminal action to the satisfaction of the jury, by competent evidence, beyond a reasonable doubt. If the defendant relies upon an *alibi* for his defense, the burden of establishing such *alibi* is upon him. If he succeeds, by competent evidence, in raising a reasonable doubt in the minds of the jury as to the fact of his presence at the place and at the time the offense was committed, he is entitled to an acquittal. As to the amount or character of the evidence necessary to create such a doubt, we think it is a matter upon which the jury are alone to pass. If the evidence offered by the defendant in support of his claim or defense of *alibi* is sufficient to raise a reasonable doubt in the minds of the jury, then the state has not satisfied the jury of the guilt of the defendant beyond a reasonable doubt, and he is entitled to an acquittal. The jury could hardly say they were satisfied of the guilt of the defendant beyond a reasonable doubt, while they entertain a doubt as to his presence at the time and place where the offense was committed, and when without such presence it would

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be impossible for him to commit the offense. The instructions of the court upon this subject were conflicting, and therefore erroneous. The sixth instruction asked by the state was, we think, erroneous, while the thirteenth instruction correctly states the law. (*State v. Shafer*, 22 Mont. 17, 55 Pac. 526; *State v. Rolla*, 21 Mont. 582, 55 Pac. 523.) We find no error in the refusal of the court to give the instructions asked by defendant. While it is true that the fourteenth instruction asked by the defendant correctly states the law, the court had already given it in the thirteenth instruction asked by the defendant, and its repetition could avail nothing. For the reasons herein given, the judgment of the district court is reversed, and the cause remanded for a new trial.

Quarles, J., concurs.

Sullivan, J., did not sit in the case, on account of sickness.

(January 21, 1899.)

SMITH v. CALDWELL.

[55 Pac. 1065.]

TRUST AND TRUSTEE—AGENCY—RIGHT OF ACTION—STATUTES OF FRAUD.—One, Sullivan, being indebted to the plaintiff, and being about to leave the state, together with the defendant, and for the purpose of securing the payment to the plaintiff of the money so due her from said Sullivan, executed and delivered to James Burns, the brother of plaintiff, and acting as her agent, the following writings: "Pocatello, Idaho, March 4th, 1897. I hereby authorize A. F. Caldwell to sell my property for \$2,100.00, and pay James Burns \$500.00, in case the property cannot be sold for any more in the next sixty days. (Signed) Garrett Sullivan. "I hereby comply with the above in case there is a sale made of the property. I have full charge of the property. (Signed) A. F. Caldwell." *Held*, that upon a sale of the property as above set forth, defendant becomes liable to the plaintiff for the sum of \$500, and a right of action accrued to her therefor.

GUARANTY.—No question of guaranty can be predicated upon said writings, nor does the transaction come within the statute of frauds.

(Syllabus by the court.)

Argument for Appellant.

APPEAL from District Court, Bannock County.

Thomas F. Terrell and C. A. Warren, for Appellant.

The contention of appellant is that these facts raise three main questions and justify the following conclusions, to wit: 1. That the writing and transaction set forth in the complaint is a pure and simply guaranty; 2. That it is a collateral undertaking to pay the debt of another, without extinguishing the principal debt, and is within the statutes of fraud; and that it cannot be varied, altered, modified or explained in parol; 3. That it is a contract utterly without a consideration, affirmatively appearing from the complaint, and is therefore void. A guaranty is an undertaking to answer for another's liability and collateral thereto. A collateral undertaking to pay the debt of another in case he does not pay it. (1 Bouvier's Law Dictionary, 644; 2 Parson's Bill and Notes, 2d ed., 117; De Callyer on Guaranty, 1; Story on Contracts, sec. 852; *Dole v. Young*, 24 Pick. (Mass.) 252; *Harris v. Frank*, 81 Cal. 280, 22 Pac. 856-858; *Briggs v. Latham*, 36 Kan. 205, 13 Pac. 129, 130; 9 Am. & Eng. Ency. of Law, p. 67, notes; Brandt on Suretyship and Guaranty, sec. 1; *Kearnes v. Montgomery*, 4 W. Va. 29; Idaho Rev. Stats., sec. 6009, subsec. 2; Brandt on Suretyship and Guaranty, sec. 37.) The mere fact that an advantage may incidentally result to the promisor for his oral promise to pay the debt of another is not sufficient to take it out of the statutes of fraud; there must be other evidence that such advantage was the object or consideration of the promise. (*Clapp v. Webb*, 52 Wis. 638, 9 N. W. 796; *Morrissey v. Kinsey*, 16 Neb. 17, 19 N. W. 454; *Ruppe v. Peterson*, 67 Mich. 437, 35 N. W. 82.) A contract, or any portion thereof reduced to writing, cannot be altered by parol evidence. (Clark on Contracts, 565, 566; *Baugh v. White*, 161 Pa. St. 632, 29 Atl. 267.) The complaint must allege a consideration coextensive with and legally sufficient to support the promise as laid and in accordance with the actual facts. (Shipman on Common Law Pleading, 221, 207; *Harding v. Craigie*, 8 Vt. 501; *Estee's Pleading*, secs. 321, 338, 967; *Prundle v. Car-*

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uthers, 15 N. Y. 425; *Jerome v. Whitney*, 7 Johns. 321; *Joseph v. Holt*, 37 Cal. 250; *Moore v. Waddle*, 34 Cal. 145-147.)

W. T. Reeves, for Respondent.

We contend that the promise of appellant is not a promise to answer for the debt of Sullivan—not a promise that Sullivan shall pay, but that he will pay. His promise does not depend on the act or conduct of another, but upon his own act. (DeCollyer on Guaranties, Principles and Sureties, 83.) The appellant never at any time agreed to pay or become responsible for the debt of another. (*Hughes v. Fisher*, 10 Colo. 383, 15 Pac. 702; *Putnam v. Farnham*, 27 Wis. 189, 9 Am. Rep. 459; *DeWalt v. Hatzell*, 7 Colo. 601, 4 Pac. 1201; *Mason v. Wilson*, 84 N. C. 51, 37 Am. Rep. 612; Clark on Contracts, 98; *Lucas v. Payne*, 7 Cal. 92.) We do admit that the mere possession of property of the debtor is insufficient, but if while possessed of property of the debtor he is directed that out of the proceeds he pay the debt, and he promises to so apply the fund of the debtor, it then becomes immaterial whether the property was before held or was placed in his hands simultaneously with the making of the promise. (*Mason v. Wilson*, 84 N. C. 51, 37 Am. Rep. 614; *Hughes v. Fisher*, 10 Colo. 383, 15 Pac. 702.) When a duty to pay out of the fund in his hands arises, the promise to pay is collateral. (*Belknap v. Bender*, 75 N. Y. 446, 31 Am. Rep. 476.)

HUSTON, C. J.—Plaintiff sued defendant to recover the sum of \$500, claimed to be due and owing from defendant to plaintiff. Plaintiff recovered judgment in the district court, and, from said judgment and the order overruling motion for new trial, this appeal is taken. The facts as they appear in the record are substantially as follows: Plaintiff held the note of one Garrett Sullivan for the sum of \$500, which she had left in the hands of her brother James Burns for collection. Sullivan was about to leave the state, and Burns insisted upon his paying or securing said note; otherwise, he should have him arrested. Thereupon Sullivan went to the house of the defendant, where papers were executed of which the following are copies:

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"Pocatello, Idaho, March 4, 1897.

"I hereby authorize A. F. Caldwell to sell my property for \$2,100, and pay to James Burns \$500 in case the property cannot be sold for any more in the next sixty days.

(Signed) "GARRETT SULLIVAN."

"I hereby comply with the above in case there is a sale made of the property. I have full charge of the property.

(Signed) "A. F. CALDWELL."

These papers were subsequently delivered to said James Burns. The property was purchased by defendant, and after such purchase said James Burns, on behalf of his said sister, made demand of defendant of payment of said sum of \$500. Payment being refused, this action was brought.

It is contended by appellant: "1. That the writing and transaction set forth in the complaint (being the writing above set forth) is a pure and simple guaranty; 2. That it is a collateral undertaking to pay the debt of another, without extinguishing the principal debt, and is within the statutes of fraud, and that it cannot be varied, altered, modified, or explained in parol; 3. That it is a contract utterly without consideration, affirmatively appearing from the complaint, and is therefore void." None of these contentions are, in our view, maintainable. Sullivan owed plaintiff \$500. For the purpose of paying it, he places certain property in the hands of the defendant, with the understanding that the defendant shall sell the same, and out of the proceeds pay the \$500 due and owing from said Sullivan to plaintiff. Defendant accepts the trust, disposes of the property, by selling it to himself and another, and then repudiates the trust. If there is or ever was any rule of law making such a transaction a "guaranty," we have never come across it. The agreement evidenced by the writing executed by Sullivan, and delivered to James Burns, established a conditional trust in favor of the plaintiff, of which the defendant was trustee; and the defendant accepted the trust, and thereby became liable to pay to the plaintiff the said sum of \$500 upon the happening of the condition precedent upon which such liability on the part of the defendant was predicated, to wit,

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the sale of the property. There is no element of guaranty in the transaction. It would be as proper to say that an assignee to whom a debtor had assigned his property for the benefit of his creditors, by the mere act of accepting such assignment, becomes the guarantor of his assignor as to all of his debts.

Appellant cites subdivision 2, section 6009 of the Revised Statutes of Idaho, which is as follows: "A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in the next section is void unless the same or some other note or memorandum thereof be in writing and subscribed by the party charged or by his agent." This provision has no application to the case under consideration. The defendant made no promise to answer for the debt, default or miscarriage of Sullivan. Having property of Sullivan in his hands, he simply agrees to sell it, and apply a portion of the proceeds of such sale to the payment of a debt due from Sullivan to the plaintiff. If he fails to sell the property, or if he does not realize sufficient from the sale of it to pay the amount due plaintiff, he does not incur any liability. The only way in which the defendant can become liable is by pursuing the course he did pursue, according to the record, sell the property, retain the proceeds, and repudiate the trust. Section 6010 of the Revised Statutes of Idaho is as follows: "A promise to answer for the obligation of another in any of the following cases is deemed an original obligation of the promisor, and need not be in writing: 1. Where the promise is made by one who has received the property of another upon an undertaking to apply it pursuant to such promise." The case made by this record comes clearly within this provision of the statute. The claim of counsel for appellant that the property was not received by the defendant "upon an undertaking to apply it" to the payment of the debt due from defendant to plaintiff, because the defendant was in possession of the property at the time the agreement was made, involves a subtlety of distinction which, we admit, we are utterly unable to cope withal. Had the contract or agreement between Sullivan and the defendant rested entirely in parol, the right of action of the plaintiff would have been the same under the provisions of section 6010 of the Revised Statutes.

Argument for Appellant.

The objection of appellant's counsel that the agreement of defendant was to pay \$500 to James Burns, and not to the plaintiff, cannot be recognized. All of the parties—Sullivan, the defendant, and Burns—well understood that the money stipulated to be paid by defendant to James Burns was money due from Sullivan to the plaintiff; that Burns, her brother, was simply acting as her agent. The plaintiff was the real party in interest from the beginning, and she had never in any way parted with, assigned, or alienated her interest, and, under our code, she was the proper party to bring the action. There being no question of guaranty involved in this case, the brief and argument of appellant has little or no applicability. The facts are simple, and the rule of law applicable thereto so uniformly recognized that further discussion would seem scarcely excusable. The judgment of the district court is affirmed, with costs to respondent.

Quarles, J., concurs.

Sullivan, J., was, by reason of sickness, unable to be present at the hearing of this case.

(January 25, 1899.)

JONES v. OREGON SHORT LINE RAILWAY.

[56 Pac. 76.]

EVIDENCE INSUFFICIENT TO SUPPORT THE JUDGMENT.—Evidence in this case examined and held not to support judgment. *Kelly v. Oregon Short Line etc. R. R. Co.*, 4 Idaho, 190, 38 Pac. 404, distinguished.

LIABILITY FOR INJURY TO ANIMALS.—Railroad company held not liable for injury to animals, where there is an entire absence of proof of negligence on the part of the railroad company.

(Syllabus by the court.)

APPEAL from District Court, Lincoln County.

P. L. Williams and Joseph H. Blair, for Appellant.

There is neither testimony nor evidence in the case that the steer and bull were killed in consequence of the carelessness or

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negligence of anyone. That they were killed by the cars of the appellant raises no presumption of negligence on the part of the defendant or any one of its servants or agents. As this question has so frequently been passed upon by this court, we will rest with citing some of the cases, and ask the court's consideration of them, to wit: *Cateril v. U. P. Ry. Co.*, 2 Idaho, 576, 21 Pac. 416; *Holt v. Spokane etc. Ry. Co.*, 4 Idaho, 443, 40 Pac. 56; *King v. Oregon etc. R. Co.*, ante, p. 306, 55 Pac. 665; *Lindsay v. Ry. Co.*, 27 Vt. 643; *Flattes v. C. etc. R. Co.*, 35 Iowa, 191; *Brown v. H. etc. R. Co.*, 33 Mo. 309; *Scott v. Railway Co.*, 4 Jones (N. C.), 432.

Guy C. Barnum and James H. Hawley, for Respondent.

We think the case of *Kelly v. Oregon Short Line etc. R. R. Co.*, 4 Idaho, 190, 38 Pac. 404, settles the contention in this case. The facts in that case are almost identical with the facts in this case, and the court says in concluding the opinion: "We think sufficient was shown by plaintiff to put the defendant to its proof. In fact, we do not even see, in the absence of an eye-witness, how more could be proved by plaintiff, and the only eye-witnesses were the employees of defendant." Section 2680 of the Revised Statutes of Idaho provides as follows: "Every railroad company operating any line of railroad within this state that maims or kills any . . . cow, heifer, bull, ox, steer, or calf, or any other domestic animals, by running any engine or cars over or against any such animal, is liable to the owner of such animal for damages sustained by such owner by reason thereof, unless the injury occurred through the neglect or fault of the owner."

HUSTON, C. J.—This action was brought in justice's court to recover the value of certain animals alleged to have been killed by the defendant running an engine and cars over and against the same. Plaintiff recovered judgment in the justice's court, and defendant appealed to the district court, where the case was tried upon the following agreed statement of facts: "It is stipulated and agreed by and between the plaintiff and defendant that the plaintiff, if personally present and sworn in court, would testify as follows, to wit: That during the

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latter part of April and in the early part of May, 1897, he was the owner of one steer and one bull, the same as described in his complaint herein; that he turned them (with other stock) out to run at large upon open, unfenced government in Lincoln county, Idaho, in April, 1897; that for several weeks he did not see the same, nor the herd with which said steer and bull were running at large; that some time about the middle of June, or perhaps a little thereafter, he missed said steer and bull, and made a search for them; that, upon such search made, he was unable to find them; that thereupon he went to Shoshone, and examined the record kept by the agent of the defendant, pursuant to section 2681 of the Revised Statutes of Idaho, showing the brands, marks, color, and age of stock killed by the railroad company, and there found the description of his steer and bull as having been killed by the railroad company upon its track by its locomotive on or about May 10, and June 14, 1897, at or near mile-post 340. And further than this he has no knowledge of any of the facts connected with the killing, and he has no other or further evidence to offer, except that he knows that the country at and around said mile-post is level country; that the railroad is not fenced there; that it is government land, lying along and abutting the defendant's right of way and railroad track for a long distance both ways from said mile-post 340; that he does not know whether his stock was killed in the daytime or in the night-time; that he does not know whether it was hit by a freight or passenger train; he does not know which way the train which hit the same was going; he has no knowledge of what care or want of care was used or exercised to prevent hitting the same, and does not know but the greatest of care was used; he knows nothing in relation to the killing except what the said record book showed to him. The value of the steer was twenty dollars and the bull twenty-five dollars; both forty-five dollars. And he has no other evidence to offer." Respondent relies upon the case of *Kelly v. Railroad Co.*, 4 Idaho, 190, 38 Pac. 404, decided by this court. In the Kelly case, the plaintiff identified the animal killed, the time when it was killed, and proved that at the time, which was in the night-time, there

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was snow upon the track; that the animal killed was of a black color; that the track at the place of killing was straight for a mile or more; that there were tracks between the rails for some distance to where the animal was knocked off the track—quite a different state of facts from that presented by the record in this case. We do not think the facts shown in the agreed statement of facts in this case are sufficient to warrant the judgment. Respondent cites and relies upon section 2680 of the Revised Statutes of Idaho. This section was declared to be unconstitutional by the supreme court of the territory of Idaho in *Cateril v. Railway Co.*, 2 Idaho, 576, 21 Pac. 416, and *Railway Co. v. Holt*, 4 Idaho, 443, 40 Pac. 56. Judgment of the district court is reversed, with costs to appellant.

Quarles, J., concurs.

Sullivan, J., did not sit at the hearing of this case, on account of sickness.

(January 26, 1899.)

KIESEL v. CLEMENS.

[56 Pac. 84.]

HOMESTEAD—RESIDENCE—OCCUPANCY BY FAMILY AS A HOME.—The fact that the homestead is occupied in whole or in part as a hotel does not deprive it of any of the benefits or immunities prescribed by the statutes, so long as it is used and occupied by the owner as a home and residence of himself and family, and is within the limitations of the statute as to value. Occupancy as a residence, and value, are the only limitations placed upon the homestead by the statutes of Idaho.

(Syllabus by the court.)

APPEAL from District Court, Bannock County.

S. C. Winters and Hawley & Puckett, for Appellant.

Admitting, for the sake of argument, that at the time the declaration of homestead was filed that the said defendant Clemens was using the premises as a hotel, still we claim that

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under our statute it was subject to homestead. Section 3035 of the Revised Statutes of Idaho defines a homestead to "consist of the dwelling-house in which the claimant resides and the land on which the same is situated, selected as in this title provided." (*Heathman v. Holmes*, 94 Cal. 291, 29 Pac. 404.) The only tests are use and value. (*Gaylord v. Place*, 98 Cal. 472, 33 Pac. 484; *Kennedy v. Gloster*, 98 Cal. 143, 32 Pac. 941; *In re Ogburn's Estate*, 105 Cal. 95, 38 Pac. 498.) The homestead law is remedial and is to be liberally construed in favor of the exemption. (*Vogler v. Montgomery*, 54 Mo. 577; *Quackenbush v. Reed*, 102 Cal. 493, 37 Pac. 755; *Franklin v. Coffee*, 18 Tex. 413, 70 Am. Dec. 292; *Riggs v. Sterling*, 60 Mich. 643, 1 Am. St. Rep. 554, 27 N. W. 705; *Bauchard v. Bourassa*, 57 Mich. 8, 23 N. W. 452; *Campbell v. Adair*, 45 Miss. 178; *Rhodes v. McCormick*, 4 Iowa, 374, 68 Am. Dec. 663; *Horn v. Tufts*, 39 N. H. 483; *Waples on Homesteads and Exemptions*, 188; *Beaton v. Reid*, 111 Cal. 484, 44 Pac. 167.) The head of a family who occupies one room of his building as a residence does not lose his homestead right by renting out the balance of the building for use as a hotel. (*Gainus v. Cannon*, 42 Ark. 514.)

W. T. Reeves and Thomas F. Terrell, for Respondent.

Unless he, declarant, was personally residing upon the premises at the time of making the declaration, he could not declare a homestead, and the fact that he was so residing upon the premises at the time of making the declaration must be stated in the declaration. (*Boreham v. Byrne*, 83 Cal. 23, 23 Pac. 212.) In all cases, residence on the land is requisite to consummate the claim of homestead. (*Gregg v. Bostwick*, 33 Cal. 220, 91 Am. Dec. 637; *Man v. Ragen*, 35 Cal. 316.) The provisions of the statute prescribing what shall be contained in the declaration of homestead are mandatory, and a compliance with them is essential to the validity of the homestead. (*Ashley v. Olmstead*, 54 Cal. 616; *Ames v. Eldred*, 55 Cal. 136.) While notice and demand for possession of the premises in controversy was given to the defendant, before the bringing of this suit, it was wholly unnecessary. (*Kilburn v. Ritchie*, 2 Cal. 145, 56 Am. Dec. 326; *Joy v. McKay*, 70 Cal. 445, 11 Pac.

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763; *Hauzhurst v. Labre*, 38 Cal. 563; *McCarthy v. Yale*, 39 Cal. 585; *Martin v. Spivolo*, 56 Cal. 128.) A building used primarily as a hotel or for other business purposes cannot be regarded as a homestead, though the owner and his wife reside there for the purpose of carrying on the business. (*Laughlin v. Wright*, 63 Cal. 113; *McDowell v. His Creditors*, 103 Cal. 264, 42 Am. St. Rep. 114, 35 Pac. 1031.)

HUSTON, C. J.—This is an action to recover possession of certain real estate situated in Soda Springs, Bannock county, state of Idaho, and to quiet the title thereto in plaintiff. The complaint alleges recovery of a judgment by plaintiff against defendant, execution and sale thereon, and deed to plaintiff, as purchaser, by the sheriff, demand of possession by plaintiff, and refusal by defendant. Defendant answers, admitting the judgment, but alleges that, at the time said deed was executed and delivered by the sheriff, the time for redemption under said sale had not expired, and claims that for that reason said deed is void. No evidence appears to have been offered upon this point. Defendant also avers in his answer, and sets up in a cross-complaint, as to the property described in the complaint, that a long time prior to the rendition of said judgment, to wit, on the seventh day of October, 1889, defendant filed a declaration of homestead upon the real estate described in the complaint; that, at the time of filing said declaration, defendant was the head of a family; that he was residing on the premises therein described, and has continued ever since to reside thereon with his said family; and prays, in his cross-complaint, that said sheriff's deed to plaintiff be declared null and void, and that the same be ordered canceled; that it be decreed that said premises are a homestead; and that defendant be adjudged the owner thereof; for his costs; and for general relief. Upon the trial the defendant offered in evidence the following document:

"Homestead Statement.

"Know all men by these presents, that I am the head of a family, residing at Soda Springs, Idaho territory, county of Bingham, and on the premises herein described, as follows, to

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wit: Lot eight (8) in block twenty-six (26) in said Soda Springs survey, and containing one and one-quarter acres, in S. 12, Tp. 9 S., of R. 41 E., B. M. That said premises above described are of the actual cash value of five thousand dollars. That I claim the above-described property as a homestead, under and by virtue of the laws of the territory of Idaho.

(Signed) "WILLIAM CLEMENS."

This instrument was duly acknowledged on October 7, 1889, and duly recorded. Plaintiff had judgment in the district court, from which judgment this appeal is taken.

The only question presented by this record for our consideration is, Was the property described in the declaration of homestead, at the time the same was made and recorded, subject to be declared upon as a homestead, under the statutes of Idaho? The district court held that, by reason of said premises being occupied by defendant and his family as a hotel at the time the declaration of homestead was filed, the same was not subject to homestead declaration, and the declaration filed thereon was void and of no effect to exempt said premises from levy and sale on execution. With this conclusion of the district court we cannot agree. The character of the occupancy, or use of the premises claimed as a homestead, so long as the same is occupied by the declarant as a residence and home for himself and his family, is immaterial, under the statutes of this state. The only limitations prescribed by the statutes of this state to the acquisition of homestead rights are residence and value. There is no distinction in our statutes, as there is in many of the states, between real estate located in a town, city, or village, and land used and occupied as a farm. There is no limitation in our statutes upon the amount of land that may be included in a homestead, so long as it is occupied as a residence, and does not exceed in value the limitations prescribed by the statute. If other limitations are deemed requisite, they must be fixed by the legislature, and not by the courts. The declaration of homestead in this case fully complies with the requirements of the statute. A liberal construction as to occupancy of homestead seems to be the rule recognized in most of the states, even where the restrictions are far less latitudinous than they

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are in this state. (*Heathman v. Holmes*, 94 Cal. 291, 29 Pac. 404; *Gaylord v. Place*, 98 Cal. 472, 33 Pac. 484; *Gainus v. Cannon*, 42 Ark. 514; *Kelly v. Baker*, 10 Minn. 154 (Gil. 124); *Umland v. Holcombe*, 26 Minn. 286, 3 N. W. 341; *Lazell v. Lazell*, 8 Allen, 575; *Binzel v. Grogan*, 67 Wis. 147, 29 N. W. 895.) The judgment of the district court is reversed, with costs to appellants. The district court is directed to enter judgment in favor of defendant Clemens, as prayed in his cross-complaint.

Sullivan, J., on account of sickness, was not present at the hearing.

Quarles, J., concurs.

(January 27, 1899.)

PATRIE v. OREGON SHORT LINE RAILROAD CO.

[56 Pac. 82.]

RAILROADS—FENCING TRACKS.—Under the provisions of section 2679 of the Revised Statutes, railroad corporations must make and maintain a good and sufficient fence on both sides of its track where the line passes through private land.

SAME—STOCK KILLED.—If it fails to do so, it is liable for stock killed at the point where it is required to fence its track.

SAME—LIABILITY OF RAILROAD—STALLION RUNNING AT LARGE.—Under the provisions of section 1240 of the Revised Statutes, and act amendatory thereof (Sess. Laws 1891, p. 48), a stallion that escaped from its owner without his fault, and is killed by a railroad, at a point where the company is required by law to fence its track, and has not done so, is liable to the owner for the value of the stallion.

(Syllabus by the court.)

APPEAL from District Court, Fremont County.

P. L. Williams and Joseph H. Blair, for Appellant.

Under the evidence and peculiar circumstances of this case, as shown by the evidence, it is as reasonable to infer, or believe, that the horse had gone upon the right of way anywhere

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along the right of way, outside of plaintiff's land, as from it; and further, as a matter of law, as the plaintiff himself had no fence on any side of his own land, there was no legal obligation or duty on the part of the defendant to have a fence on the side abutting plaintiff's land; that a fence, abutting a short piece of railroad track, without fences on any other side, would not prevent cattle or horses from going around at either end, at pleasure, and getting within the fence. The legislature expected a natural and sensible construction of section 2679 of the Revised Statutes; and we submit that such a construction does not require a railroad company to fence abutting lands, unless they are inclosed on the remaining sides. The meaning of our statute is that when we cut a man's land, which is inclosed and in actual use, in two, we shall fence those sides of it which abut our right of way; and when we only abut one side, then we are to fence on that side only. It is not the fencing of our right of way where it is contiguous to the individual whose land, lying there, is elsewhere inclosed, merely; but it is the fencing of his stock on, to his own land as well, and also. We are required to fence there for his benefit. And the penalty for failure is the payment for his stock killed by reason of such failure to do what the statute requires. (1 Thornton on Railroad Fences and Private Crossings, Including Injuries to Animals on the Right of Way, sec. 43; Pierce on Railroads, 401.) Redfield lays down the same rule in his work on the Law of Railways, sixth edition, volume 1, page 507 et seq. (2 Rorer on Railroads, 1380; *Jackson v. Rutland etc. R. R. Co.*, 25 Vt. 150, 60 Am. Dec. 246.) It is not the law that the mere killing of a domestic animal by a railroad train is evidence of negligence. This question has frequently been before the courts and invariably ruled against the plaintiff, except where the general rule of law is abrogated by positive statute. (*Scott v. Wilmington etc. R. R. Co.*, 4 Jones, 432; *Indianapolis etc. R. R. v. Means*, 14 Ind. 30; *Illinois Cent. R. R. v. Reedy*, 17 Ill. 580; *Chicago etc. R. R. Co. v. Patchin*, 16 Ill. 198, 61 Am. Dec. 65. See, also, Pierce's American Railway Law, 357.) Whatever right this plaintiff, or the other owners along there had, or ever had, to a fence where his and their lands abut our right of way, Idaho Vol. 6—29

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he and they have, by their conduct, entirely and absolutely waived. (*Enright v. San Francisco etc. R. R. Co.*, 33 Cal. 230.) "The question of negligence and contributory negligence," says Mr. Beach on Railways, section 696, "in actions for the killing of livestock turns largely upon the fence laws of the state, whether they require the owners of cattle to fence them in, or whether it is the duty of the company to fence them out. No recovery can be had if the owner has permitted them to run at large contrary to law." (Citing *Vanhorn v. Burlington etc. Ry. Co.*, 63 Iowa, 67, 18 N. W. 679; *Lyons v. Terre Haute etc. R. R. Co.*, 101 Ind. 419; *Carey v. Chicago etc. Ry. Co.*, 61 Wis. 71, 20 N. W. 648; and see Beach on Contributory Negligence, secs. 237, 238.)

E. E. Chalmers and S. C. Winters, for Respondent.

Section 2679 of the Revised Statutes of Idaho makes it the duty of railroad companies to make and maintain a good and sufficient fence on either or both sides of their track or property, whenever the line of their road at any time passes through or along or abuts upon, or is contiguous to, private property or inclosed land in the possession of another. Statutes of this kind and character are intended for the benefit not only of the adjoining owners, but for the public generally. (1 Rorer on Railroads, 639, 640, and cases cited; *Atchison etc. R. Co. v. Reesman*, 9 C. C. A. 20, 60 Fed. 370. These statutes are police regulations, and are intended for the benefit of the general public, and to this effect is the most unanimous weight of judicial authority. (3 Elliott on Railroads, sec. 1190; *Jackson v. St. Louis etc. R. Co.*, 43 Mo. App. 324.) The fencing of a railroad track required by the statute implies the construction and maintaining of sufficient cattle-guards at the end of fence and at railroad crossings. In some states it is imposed by express statutory provision, but where it is not so expressed by statutory provision, the same is implied from the statute requiring the company to fence. (3 Elliott on Railroads, sec. 1198, notes 3 and 4, and cases cited in notes; 1 Rorer on Railroads, 627, 628; *New Albany etc. R. Co. v. Pace*. 13 Ind. 411.)

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SULLIVAN, J.—This is an action to recover the value of five horses alleged to have been carelessly and negligently killed by the defendant railroad company. In addition to the allegation of the careless and negligent killing of said stock, the complaint alleges that the defendant had neglected and refused to make and maintain a fence along its right of way at the points where said horses were killed, as by law required, and that said horses casually, and without the fault of plaintiff, strayed upon the grounds and track of defendant, and were killed by the engine and cars of the defendant. The cause was tried by the court, with a jury, and a general verdict rendered in favor of the plaintiff for the value of said horses, to wit, \$365. The jury was required to answer certain particular questions of fact submitted to them by the court, and under one of said questions the jury found that the engineers and persons in control of the trains by which said animals were killed were using reasonable and ordinary care in running said trains. This, it is conceded, disposed of the issue of the killing of said horses by the careless and negligent running of said trains. A motion for a new trial was made, and, before it was heard, the plaintiff, who is respondent here, made an offer in writing to remit from the judgment the value of the horse and mare killed near defendant's mile-post No. 204½, thus reducing the judgment for damages to \$320. The motion for a new trial was denied, and the appeal is from the order overruling the motion for a new trial, and from the judgment.

It appears that said horses were killed on three several days, and between mile posts Nos. 203 and 204½, on what is known as the "Utah and Northern Railway," north of Market Lake station, which station is situated on section 32, as per government survey. It also appears that the track of the defendant extends nearly due north from said station, and runs through sections 29, 20, and 17, as per government survey, and about two hundred yards east of a line passing north and south through the center of said sections. Said mile-post No. 203 is situated on the easterly side of said track, and near the north line or boundary of said section 29. Said mile-post No.

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204½ stands near the northern boundary of said section 17, and at the east side of said track. The land on the east side of said track, and north from said Market Lake station, is open, uninclosed land, on which horses and other stock are free to range. The greater portions of said sections 29, 20, and 17 are owned by private parties, and those parts of said sections situated on the west side of said railroad track are inclosed with a fence. The defendant corporation has fenced its line of road and track on the west side from the south boundary of said section 29 to near the north boundary of said section 17, but has not fenced its track on the east side, where the same runs through said sections 29, 20, and 17. A Mrs. Neeb owns the south half of said section 17, and has that lying on the west side of said track fenced; Patrie, the plaintiff, owns the north half of said section 20, and has the part thereof lying on the west side of said track fenced; and other persons own the south half of said section 20, and have the part thereof lying on the west side of said track fenced. The horse killed on September 8, 1897, was killed near the south side of the north half of said section 20, and a little south of mile-post No. 203½; and the stallion killed November 3, 1897, was killed on the north half of said section 20, a little north of said mile-post No. 203½.

The controlling contention is whether, under the facts, the defendant is liable in damages because of its failure to fence its track at the points where said horses were killed. The provisions of the statute controlling this matter are found in section 2679 of the Revised Statutes, and are as follows: "Railroad corporations must make and maintain a good and sufficient fence on either or both sides of their track or property, wherever the line of their road at any time passes through or along, or abuts upon or is contiguous to private property or inclosed land in the actual possession of another." Counsel for appellant contend that the legislative intent in the enactment of said section 2679 was to require railroad corporations only to fence their roads whenever, on either side, the same are contiguous to private property which is inclosed, or to land which is not actually owned by the one who is using it, or

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is in the actual possession thereof, and has it inclosed. It appears from the record that the defendant's track and right of way run through said sections 29, 20, and 17, which sections are owned by private persons; that the greater portions of said sections lying on the west side of said track are fenced, and in the possession of the owners. It also appears that the parts of said sections lying east of said track are not fenced, and stock range thereon without let or hindrance. It appears that the horses, for the value of which plaintiff obtained judgment, excluding the mare and horse which were eliminated from this case as above stated, were ranging, if not on the owner's land east of the track, on the uninclosed land of other private parties; that said stock casually strayed on said right of way by reason of said track not being fenced, and was killed. If the provisions of said section require the defendant corporation to fence its track wherever and whenever it runs through land owned by private persons, the judgment must be sustained. The intent of the legislature in enacting said section must be arrived at from a literal construction, if such construction would not result in an absurdity or inconsistency. The statute declares that a railroad corporation must make and maintain a good and sufficient fence, on either or both sides of their track or property, wherever the line of road passes through or along, or abuts upon or is contiguous to, private property or inclosed land in the actual possession of another. The record shows that said track passes through private property, and we think the statute, as applied to the facts of this case, is too clear to require any construction. To hold that it does not require the defendant corporation to fence its track except when and where a private person may fence his land, would be injecting language into said section that is not found there, and could not be put there by fair implication and reasonable construction. We think the record fairly shows that if the said track had been fenced where it passes through said sections 29, 20, and 17, said horses would not have been killed. It may be said that building a fence on the east side of said track where it passes through said private property would be no protection

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to stock; that stock could pass around the ends of such fence and get upon the track. The fencing of a railroad track, when required by statute, where it passes through private property, as in this case, implies the construction of sufficient cattle-guards at the ends of such fences. (3 Elliott on Railroads, sec. 1198, and notes.) We think the record shows that said horses would not have been killed, where and when they were killed, if the defendant had maintained such a fence as the law requires.

It is contended by counsel for appellant that there is no proof that said horses came upon the track at a point where the company was required to fence. It is admitted that they were killed on the track at points where it was the duty to fence, and the presumption is, in the absence of proof, that the animals came upon the track at such point. (3 Elliott on Railroads, sec. 1214.)

It is contended that the stallion that was killed was running at large in violation of law, and for that reason the plaintiff is not entitled to recover his value. The jury found that said stallion was not running at large at the time he was killed, but had escaped from an inclosed pasture in which he had been kept. We think the finding of the jury is conclusive of the question of the stallion running at large.

The judgment of the court below must be sustained, with instructions to modify the judgment, if it has not already been done, by reducing said judgment to the sum of \$320, for damages in accordance with plaintiff's written offer above referred to. Costs of this appeal are awarded to respondent.

Huston, C. J., and Quarles, J., concur.

Argument for Petitioner.

(January 30, 1899.)

SWEENEY v. MAYHEW, JUDGE.

[56 Pac. 85.]

CERTIORARI—JURISDICTION—RECEIVER.—*Certiorari* will lie to review an order appointing a receiver, so as to determine from the case as presented to the lower court whether jurisdiction existed in such court, in the particular case made to appoint a receiver.

SECTION 4329 OF THE REVISED STATUTES CONSTRUED.—It is error to appoint a receiver in any of the class of cases mentioned in section 4329 of the Revised Statutes of Idaho, where the equities of the complaint are fully denied by the answer and the evidence introduced by plaintiff on the hearing of the application for the appointment of such receiver is fully met and overcome by counter evidence introduced by the defendant.

PLEADING—EQUITIES DENIED BY ANSWER—APPOINTMENT OF RECEIVER.—Plaintiff applied for appointment of a receiver; defendants filed their sworn answer denying every equity, and material allegation set forth in the complaint; on the hearing of the application, the pleadings, the affidavit of plaintiff and one witness in his behalf, the affidavits of three witnesses on behalf of the defendants, were considered by the district judge; it was not alleged or proven that the defendants were insolvent or unable to respond to the plaintiff in damages. *Held*, that under such showing, the order made by the district judge was without authority, and should be annulled on *certiorari*.

(Syllabus by the court.)

Original proceeding by *certiorari*.

W. B. Heyburn, E. M. Heyburn and L. A. Doherty, for Petitioner.

The jurisdiction exercised by courts of equity in administering relief by the extraordinary remedy of a receiver *pendente lite* is a branch of the general preventive jurisdiction, being intended to prevent injury to the thing in controversy and to preserve it for the security of all parties in interest, to be disposed of as the court may finally direct. Its effect, temporarily at least, is to deprive the party of his property before a final judgment or decree is reached by the court determining the rights of the parties. It is not to be exercised doubtfully, but the court must be convinced that the relief is needful, and it

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should not be granted except in a clear case, and never unless the plaintiff would otherwise be in danger of suffering irreparable loss. (High on Receivers, 3d ed., secs. 3, 7.) The probability that plaintiff will ultimately be entitled to a decree in his action is a material element to be considered by the court. And when upon the entire record this is a matter of much doubt, the court is justified in its discretion in refusing a receiver. (High on Receivers, sec. 8; *Owen v. Homan*, 3 Macn. & G. 378; *Wilkenson v. Dobbie*, 12 Blatchf. 298, Fed. Cas. No. 17,670.) An important principle of general application in the exercise of this branch of the extraordinary jurisdiction of equity is that the plaintiff is never entitled to a receiver when the equities of his case are fully and fairly denied by the sworn answer of the defendants. The question is no longer regarded as one addressed to the discretion of the court, but it is judicial error to appoint a receiver when the allegations of the bill are thus denied. (High on Receivers, sec. 24; *Henn v. Walsh*, 2 Edw. Ch. 129; *Fairbairn v. Fisher*, 4 Jones Eq. 390; *Crombie v. Order of Solon*, 157 Pa. St. 588, 27 Atl. 710; *Thompson v. Diffenderfer*, 1 Md. 489.) While, ordinarily, an appellate court will not review a discretionary act of the lower court, the rule is that where the action of the court performed in the exercise of such discretion affects a substantial right of the defendant, as to the enjoyment of property, the appellate court will review the discretion so exercised. (*Dollard v. Taylor*, 33 N. Y. Super. Ct. Rep. (1 Jones & S.) 496; *Grant v. Webb*, 21 Minn. 39; *Knight v. Nash*, 22 Minn. 452; *McCord v. Weil*, 33 Neb. 868, 51 N. W. 300; *Ruffner v. Mairs*, 33 W. Va. 655, 11 S. E. 5.) In an action between partners for a dissolution and an accounting, where the complaint contains no allegation of the insolvency of defendants, who are not actively carrying on the business, and the answer alleges that they are solvent, and able to respond in damages, and denies the equities of the complaint, a receiver should not be appointed before the final hearing of the cause. (*Wales v. Dennis*, 9 Wash. 308, 37 Pac. 450.)

John R. McBride and C. W. Beale, for Defendant.

No brief filed.

Opinion of the Court—Quarles, J.

QUARLES, J.—October 17, 1898, Kennedy J. Hanly, as plaintiff, filed his complaint in the district court of Shoshone county against Charles Sweeny, F. Lewis Clark, and the Empire State-Idaho Mining and Developing Company, a corporation, defendants, for the purpose of setting aside and having declared null and void a deed made by the said plaintiff conveying to the said defendants Sweeny and Clark an undivided one-eighth interest in and to the Skookum lode mining claim, situated in Shoshone county, Idaho, to have an accounting for the proceeds of ores extracted from said mining claim by defendants, and for the appointment of a receiver to take possession and control of the property in dispute during the pendency of the action, and for other relief. The theory set forth in the complaint as the basis of this action is that said deed was procured by the defendants through fraud, in two particulars, to wit: 1. That at the time of the making of said deed said defendants had opened and discovered large bodies of rich ore in the said Skookum claim, which fact was unknown to the plaintiff, and fraudulently concealed from him by the defendants. 2. That said defendants fraudulently obtained possession of said deed in the following manner, to wit: That the plaintiff, being the owner of an eleven twenty-fourths interest in and to said Skookum claim, and also to one hundred thousand shares of stock in the Chemung Mining Company, a corporation, did on the thirtieth day of April, 1898, enter into two separate options or escrow contracts, under, by and through which he placed said shares of stock in one envelope, and deposited the same in escrow with the Exchange National Bank of Spokane, Washington, with instructions indorsed thereon, directing and authorizing said escrow holder to deliver said envelope and its contents to the defendants Charles Sweeny and F. Lewis Clarke upon their payment to said bank for the credit of plaintiff of the sum of \$18,000, to be paid on or before August 1, 1898; that in another envelope the plaintiff deposited the deed in question, conveying to the defendants Sweeny and Clark, from the plaintiff, an undivided one-eighth interest in and to said Skookum claim, and also another deed conveying from plaintiff to said defendants an undivided one-third interest in and to said Skookum claim,

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upon which envelope the plaintiff indorsed instructions to said escrow holder to deliver said envelope to said defendants upon their payment into said bank, to the credit of plaintiff, the sum of \$10,000, on or before the first day of August, 1898; that on June 7, 1898, said defendants paid \$2,000 on said stock transaction, and on same day the plaintiff, by writing indorsed on each of said envelopes, respectively, extended the time of making such payments until September 20, 1898. It is alleged by the plaintiff that, some time between their deposit in escrow as aforesaid, the deed conveying the one-eighth interest from plaintiff to said defendants was extracted from the envelope in which it was placed, and put into the envelope containing the shares of stock, and that on September 19, 1898, said defendants paid into said bank the balance of the purchase price on the stock transaction, \$16,000, and received from said bank said stock and the deed conveying said one-eighth interest in said mining claim, and immediately thereafter fraudulently placed said deed upon record in the office of the county recorder in and for Shoshone county. Every material allegation in the complaint has been specifically denied by the answer of the defendants, which answer fully meets and denies each and every equity set forth in the complaint. The answer affirmatively sets forth the following facts: That on April 30, 1898, the defendants Clarke and Sweeney entered into a contract with plaintiff whereby the plaintiff was to and did put into one envelope, and place in escrow with said Exchange National Bank, said one hundred thousand shares of stock in the Chemung Mining Company, and the deed conveying from said plaintiff to said defendants an undivided one-eighth interest in and to said Skookum claim, and indorsed upon said envelope directions to said bank to deliver the same to said defendants upon their making the payment above set forth; that at said time said plaintiff placed in escrow, in a separate envelope, a deed conveying from plaintiff to said defendants an undivided one-third interest in and to said Skookum mining claim, upon which envelope directions were indorsed, signed by plaintiff, authorizing said escrow holder to deliver said last-named envelope to said defendants upon their payment into said bank, for the credit of plaintiff

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the sum of \$10,000 on or before August 1, 1898. It is further alleged and shown in said answer that the said plaintiff acquired, or claimed to acquire, the undivided one-third interest in and to said mining claim mentioned in said deed under a conveyance made by one Clarence Cunningham, as administrator of the estate of David McKelvy, deceased, in 1897, that the interest of said deceased in and to said claim was sold by said administrator under an order of sale duly made by the probate court of said Shoshone county, at which sale but one bid therefor was made, and that in the sum of \$700, which bid was made by the Chemung Mining Company, a corporation, and that said administrator made his return of sale to said probate court, to the effect that he had sold the said interest in said mining claim to the Chemung Mining Company, which sale was by said probate court on August 13, 1897, confirmed; that on July 26, 1897, the plaintiff, by representing that he was one of the directors of said Chemung Mining Company, and the proper person to take the title to said real estate, induced the said probate court to confirm the said sale to him, notwithstanding the said sale had actually been made to said Chemung Mining Company, whereupon the said administrator executed conveyance to said interest in said mining claim to the plaintiff; that thereafter said probate court set aside the order confirming the sale to the plaintiff, made an order confirming said sale to the Chemung Mining Company, and ordered and directed said administrator to make deed of conveyance of said real estate to the said Chemung Mining Company, which deed said administrator refused to make; that thereupon application was made by said Chemung Mining Company to the district court in and for Shoshone county for a writ of mandate to compel said administrator to convey said real estate to the Chemung Mining Company, as directed by the order of said probate court, which writ of mandate was granted peremptorily by said district court, and said administrator directed to convey said real estate to said Chemung Mining Company; and thereupon said administrator appealed from the judgment of the district court to the supreme court of the state of Idaho, which last-named court affirmed said judgment of the district court on May 13, 1898, and which de-

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cision was reaffirmed on rehearing by said supreme court on the thirtieth day of June, 1898 (*State v. Cunningham*, ante, p. 113, 53 Pac. 451); that thereupon a deed to said undivided one-third interest in and to said mining claim was made and delivered by said administrator to said Chemung Mining Company, and which was afterward conveyed by said Chemung Mining Company to the defendant Empire State-Idaho Mining and Developing Company, and duly recorded in the recorder's office of Shoshone county.

It is abundantly shown in the record that the principal assets of the Chemung Mining Company consisted in the interest that it owned and claimed in said Skookum mining claim. The pleadings in the record are very voluminous, and we deem it neither necessary or practical to go into the details of the allegations contained in the pleadings. An order to show cause before the defendant, as district judge, at his chambers in Wallace, Idaho, on the ninth day of November, 1898, was served upon the defendants, and pursuant to said order the application of plaintiff for a receiver was heard by said judge at chambers. Upon the hearing of said application, said pleadings were considered; also, an affidavit made by plaintiff, and one by Joseph B. Kendall on behalf of the plaintiff, and affidavits of the defendants Charles Sweeney and F. Lewis Clark, and of one E. J. Dyer, cashier of the Exchange National Bank of Spokane, were filed and used on said hearing on behalf of defendants. Said application was taken under advisement, and afterward, and on the ninth day of January, 1899, the defendant, as said district judge, made an order appointing one Barry N. Hilliard receiver, to enter upon said mining claim, and employ assistants, and keep an account of ore extracted from said mining claim, and receive from the defendants eleven twenty-fourths of the net proceeds of all ores extracted from said mining claim, and to hold the same subject to the future orders of said district court. There is no allegation in the complaint, nor evidence in the record, showing that the defendants are insolvent, or unable to amply respond to the plaintiff for all damages that he might sustain by reason of the working of said mining claim by the defendants, in the event that he is finally successful in this cause. While, on the other hand, it is shown by the plain-

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tiff that the defendants own an undisputed undivided thirteen twenty-fourths interest in and to the property in dispute, which contains large bodies of valuable ore, and is of great value.

It is contended on behalf of the plaintiff that the sole question before the court is whether or not the lower court, or the defendant, as judge thereof, had jurisdiction to make the order sought to be reviewed here. To sustain this contention, the plaintiff has cited us to a large number of California cases. We have carefully examined the authorities cited, and these authorities sustain plaintiff's contention, that the primary question here is, Did the defendant, as said district judge, have jurisdiction to make the order in question? But it is also insisted on behalf of the plaintiff that in this state district courts are courts of general jurisdiction, with jurisdiction to hear and determine all controversies, and to grant all kinds of equitable relief, including the appointment of receivers. To this we answer that district courts, and the judges thereof, have not jurisdiction to appoint receivers in any and all actions that may be pending before them. They can only appoint a receiver in the classes of cases mentioned in section 4329 of the Revised Statutes, and only in particular cases in the classes therein specified, prior to judgment, when it is made to appear that it is necessary in order to protect the rights of a party to the action, which he possesses to the thing in dispute. But it is a well-established rule that the plaintiff, the equities of whose bill have been fully met and denied, is not entitled to the appointment of a receiver, unless he overcomes the denials in such answer by further proof in support of his bill. In other words, where the equities of plaintiff's bill have been fully met and denied by a sworn answer on behalf of the defendant, the court has no discretion, and its appointment of a receiver in such case is unauthorized. (High on Receivers, 3d ed., sec. 24; *Thompson v. Diffenderfer*, 1 Md. Ch. 489; *Henn v. Walsh*, 2 Edw. Ch. 129; *Crombie v. Order of Solon*, 157 Pa. St. 588, 27 Atl. 710; *Buchanan v. Comstock*, 57 Barb. 568.) In this proceeding the pleadings and all of the evidence considered by the defendant, as district judge, when he made the order in question, were returned into this court. We have examined the evidence for the purpose of ascer-

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taining whether the appointment of the receiver was authorized by the showing made in the particular case pending in the district court, and we are fully convinced that, by the showing there made, plaintiff's case has been fully met and overcome by both allegation and proof, and that on a same kind of showing the plaintiff is entitled to no part of the relief demanded by him, and therefore the appointment of the receiver complained of was unauthorized.

As to how far the evidence may be considered in a proceeding of this kind, the rule is correctly and succinctly stated in 4 Encyclopedia of Pleading and Practice, commencing at page 262, as follows: "An exception to the rule that the sufficiency of the evidence will not be reviewed is made when the question is whether jurisdictional facts were or were not proved. This exception arises out of the most important office and function of the writ—the keeping of inferior courts and tribunals within proper bounds. If the decision of the inferior tribunal as to the sufficiency of the evidence to establish jurisdictional facts were not reviewable, the writ of *certiorari* would be of no avail as a remedy against an assumption of jurisdiction. And, for the purpose of enabling the reviewing court to determine whether jurisdictional facts were established, it will require a return to be made of the evidence upon which such facts are based." In *People v. Board of Delegates*, 14 Cal. 479 (one of the principal authorities relied upon by the defendant here), the court said: "On the other hand, the cases are numerous to the effect that the review may be extended to every issue of law and fact involved in the question of jurisdiction, and that not only the record, but the evidence itself, when necessary for the determination of this question, must be returned. The latter is the more reasonable, and, we think, the true, rule." In the case of *People v. Board of Assessors*, 39 N. Y. 81, the office of the writ of *certiorari* is defined in the following language: "That its office extends, unquestionably, to the review of all questions of jurisdiction, power and authority of the inferior tribunal to do the acts complained of, and all questions of regularity in the proceedings; that is, all questions whether the inferior tribunal has kept within the boundaries which are prescribed for it by

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the express terms of the statute law, or by well-settled principles of the common law." This definition given by the New York court we regard as a fair interpretation of section 4968 of the Revised Statutes.

The record before us clearly shows that the assertion of title by the plaintiff to eight-elevenths of the interest claimed by him in the Skookum mining claim is based upon an administrator's deed which has been adjudged by the district court below to be void, and which judgment has been affirmed in this court, thus showing conclusively that part of the interest claimed by him is without foundation. Further than that, his claim that he owned an eleven twenty-fourths interest in said mining claim, and that under one contract, by which he was to receive a consideration of \$10,000 for such interest, he placed two deeds in escrow, in the same envelope, one conveying to the defendants an undivided one-eighth interest in said claim, the other conveying an undivided one-third interest in the same claim to the same parties, is unreasonable and inconsistent with usual business methods; and this contention of the plaintiff, supported by his evidence alone, is positively and unequivocally contradicted by the evidence of three witnesses. The plaintiff has come into a court of equity, apparently with unclean hands, asking extraordinary equitable relief, the granting of which will probably be detrimental to the interests and rights of the defendants, and has failed to show himself entitled to such extraordinary relief. Our statute does not contemplate the appointment of a receiver under the facts disclosed by the return to the alternative writ heretofore granted in this proceeding; and the order made by the defendant, as district judge, appointing said receiver, was in excess of his authority, and unauthorized. Judgment will therefore be entered annulling that certain order herein reviewed, with costs to the petitioners.

Huston, C. J., and Sullivan, J., concur.

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(February 4, 1899.)

ZION'S CO-OPERATIVE MERCANTILE INSTITUTION
v. ARMSTRONG.

[56 Pac. 168.]

FORECLOSURE—RECORD ON APPEAL FROM JUDGMENT—SPECIAL VERDICT—
FINDINGS BY THE COURT—CONFLICT OF EVIDENCE.—Unless the
record contains the evidence, this court cannot determine whether
the special verdict of a jury, or the findings of fact by the court
are supported by the evidence.

(Syllabus by the court.)

APPEAL from District Court, Fremont County.

Chalmers & Ryan, for Appellants, cite no authorities upon the
question decided by the court.

Dietrich & Stevens, for Respondent.

The record in this case properly consists of the complaint,
demurrer, order overruling demurrer, answer, decision, judg-
ment and the stipulation as to testimony. The appeal is from
the judgment, and substantially without statement or bill of ex-
ceptions. The stipulation as to the evidence is insufficient upon
which to predicate or assign any error. It does not purport to
present the weight or verity of the testimony introduced, or any
ruling of the court touching the admissibility of evidence or the
propriety of instructions, if there were any. The verdict of the
jury was merely advisory, which the court could adopt or not, as
it chose. (*Prichard v. Butler*, 4 Idaho, 518, 43 Pac. 73.)

SULLIVAN, J.—This is an action of foreclosure. The in-
strument sought to be foreclosed, on its face is a warranty deed.
The defense is that the deed was given in full payment and sat-
isfaction of an indebtedness of \$3,000, exclusive of interest.
The trial was before the court with a jury. The jury found a
special verdict, which the court disregarded, and made its own
finding of facts, and entered judgment and decree for the plain-
tiff. The appeal is from the judgment.

The transcript in this case consists of the notice of appeal,
judgment-roll, and a bill of exceptions or statement of the case,

Opinion of the Court on Rehearing.

upon which the appellants rely. (Rev. Stats., sec. 4818, subd. 2.) Revised Statutes, section 4456, provides that the judgment-roll, in cases like that at bar, shall consist of the pleadings, a copy of the verdict of the jury or the finding of the court, all bills of exceptions taken and filed, and a copy of any order made on demurrer, or relating to a change of parties, and a copy of the judgment. The transcript contains no bills of exceptions or statement. As the verdict of the jury was special and advisory only, and the court refused to adopt it, but made findings of fact of its own, this court is unable to determine whether the verdict of the jury or the findings of fact made by the court is supported by the evidence, for the reason that the evidence is not contained in the record. The transcript contains a stipulation which clearly shows that there was a conflict of evidence on the contested questions of fact, and the general rule is that, when there is a substantial conflict of evidence (especially oral evidence), the court will not disturb the findings of fact made by the court. For the foregoing reasons the judgment must be affirmed. Cost awarded to respondent.

Huston, C. J., and Quarles, J., concur.

ON REHEARING.

(February 14, 1899.)

Per CURIAM.—A petition for rehearing has been filed on behalf of the appellants, which we have fully considered. The petition is a reargument of the cause in some of its phases, and presents no question of fact or of law not considered on the hearing, and nothing new in the way of authority. The appeal in this case is upon the judgment-roll, which does not contain the evidence, there being no bill of exceptions therein. But the record does show that both parties introduced evidence, and there is a stipulation in the record showing that the evidence upon the main point, whether the deed and agreement were intended by the parties as a mortgage or not, was conflicting. The evidence not being before us, we are unable to determine whether the findings of the court are sustained by the

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evidence or not. The findings cannot, under these circumstances, be disturbed. No reversible error appearing upon the judgment-roll, the judgment was properly affirmed. A rehearing is denied.

(February 7, 1899.)

TAYLOR v. CANYON COUNTY.

[56 Pac. 168.]

APPOINTMENT OF DEPUTY SHERIFF—NECESSITY OF.—Before the county commissioners can legally empower the sheriff to appoint a deputy under the provisions of section 6, article 18, Idaho constitution, they must find that the business of such sheriff's office requires the appointment of a deputy.

ALLEGATIONS OF COMPLAINT—DEMURRER.—The complaint of the sheriff in an action against the county to recover the salary of a deputy must allege that the county commissioners found that the business of said sheriff's office required the appointment of a deputy.

COUNTY COMMISSIONERS—NECESSITY OF APPOINTMENT WILL NOT BE INFERRED.—That fact will not be inferred from the facts that the county commissioners, in considering said matter, examined certain evidence, and, after being advised in the matter, empowered the sheriff to appoint a deputy.

(Syllabus by the court.)

APPEAL from District Court, Canyon County.

N. M. Ruick, for Appellant.

When the constitution declares the amount to be paid an officer, it is an appropriation made by law. (*State v. Weston*, 4 Neb. 216; *Thomas v. Owens*, 4 Md. 189; *People v. Hoge*, 55 Cal. 612-618; *State v. Holladay*, 64 Me. 526.) The point in this case is not the necessity of a deputy, as that is contemplated by the constitution and admitted by the pleadings, which show that a necessity does and did exist, and that the sheriff and county commissioners have complied with the law in making such appointment; but the point in question here is, Is it the sheriff, or is it the county, that is liable for the payment of such deputy hire? We believe the county is the party liable, and that the constitution plainly established that fact. Section 6, article

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18 of the constitution has taken from the sheriff the right to appoint deputies as was provided for under section 1815 of the Revised Statutes, and has vested the power to grant such right in the county commissioners. Section 1815 of the Revised Statutes made the sheriff liable for the compensation of his deputies, and he paid them such compensation as he was able to contract for, and this certainly was right, for no man should be compelled to pay a price for the labor he employs other than that which he agrees to pay. Section 6, article 13, makes it mandatory for the commissioners to fix the compensation which deputies shall receive when appointed, and we do not believe the constitution should be construed as fixing the price or empowering the county commissioners to fix the price. A sheriff shall pay his deputy, if, indeed, the constitution requires the sheriff to pay his deputy, out of his own pocket.

R. E. McFarland, Attorney General, and Rice & Griffiths, for Respondent.

The complaint is silent as to whether a necessity existed for the appointment of a deputy for the sheriff's office at the time the application was made. When an application for power to appoint a deputy is made by a sheriff to the board of commissioners of a county, the board must determine the necessity therefor. When determining the question of such necessity the board acts in a semi-judicial capacity. (*Campbell v. Board of Commrs.*, 5 Idaho, 53, 46 Pac. 1022; *Woodward v. Board of Commrs.*, 5 Idaho, 524, 51 Pac. 143.) The true intent of sections 6, 7 and 8 of article 18 of the constitution is indicated by the "Address to the People of Idaho" issued by a committee of the constitutional convention, and also by the following cases decided by this court, in addition to those already cited in this brief: *Hillard v. Shoshone County*, 3 Idaho, 107, 27 Pac. 680; *Guheen v. Curtis*, 3 Idaho, 443, 31 Pac. 805; *Meller v. Board of Commrs.*, 4 Idaho, 44, 35 Pac. 712; *Ada County v. Ryals*, 4 Idaho, 365; 39 Pac. 556; *Ada County v. Gess*, 4 Idaho, 611, 43 Pac. 71; *Eakin v. Nez Perces County*, 4 Idaho, 131, 36 Pac. 702.

SULLIVAN, J.—This action was brought by the sheriff of Canyon county to recover from said county the sum of seventy-

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five dollars, the salary fixed by the board of county commissioners of said county to be paid to a deputy sheriff per month, whom said board authorized said sheriff to appoint. It appears: That said sheriff made application to said board under the following provision of section 6 of article 18 of the state constitution, to wit: "The sheriff — shall be empowered by the county commissioners to appoint such deputies and clerical assistant as the business of their office may require; said deputies and clerical assistant to receive such compensation as may be fixed by the county commissioners." That the board of county commissioners of said Canyon county, at its regular meeting in January, 1897, duly considered said application, at which time the books of the said sheriff's office were examined by said board, to ascertain the volume of the business transacted in said sheriff's office, and the said sheriff was then and there duly sworn and examined and cross-examined as a witness in support of his said application or petition. That said board, being fully advised in the premises, and upon due deliberation and consideration of the evidence introduced, made an order empowering the said sheriff to appoint a deputy, and in said order fixed said deputy's salary at seventy-five dollars per month. That a deputy was appointed under the authority so given, and served as deputy for one month. That, at the end of said month, the plaintiff, who is the appellant here, properly made out in writing his claim for said services for the sum of seventy-five dollars, and duly filed the same with the clerk of said board, and thereafter said board made an order disallowing said claim. That thereafter this suit was brought, in the probate court of said Canyon county, and judgment entered in favor of the plaintiff. An appeal was taken to the district court, and the cause came on for trial *de novo*. The defendant interposed a general demurrer to the complaint, which demurrer was sustained, and judgment of dismissal entered. This appeal is from the judgment.

The only error assigned is that the court erred in sustaining the demurrer to the complaint. The question for decision is whether the complaint states a cause of action. It is contended by the respondent that the complaint contains no allegation of a necessity existing for the employment of said deputy, and that it con-

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tains no allegation that the board of commissioners found that a necessity existed for the appointment of said deputy; while, on the other hand, counsel for appellant contends that the point in this case is not the necessity of a deputy, as that necessity is contemplated by the constitution and admitted by the pleadings, which show that a necessity did exist, and that the sheriff and county commissioners had complied with the law in making such appointment, but the point involved here is, Is the sheriff or the county liable for the payment of the deputy's salary? We do not think that the necessity for the employment of deputy in any particular county was contemplated by the constitution, nor do the pleadings in this case admit that such a necessity existed. Section 6 of article 18 evidently contemplates that a necessity may arise for the appointment of a deputy sheriff. It also contemplates that, when it is made to appear to the county commissioners that the services of a deputy are necessary to the proper conduct of the business of the sheriff's office, they may empower the sheriff to appoint such deputy, and may fix the salary of such deputy. However, before the county commissioners are authorized to empower the appointment of a deputy, they must find that the business of the office requires the assistance of one. Counsel for appellant is mistaken when he says that the necessity for a deputy is admitted by the pleadings. The defendant interposed a general demurrer to the complaint, which was sustained by the court, and judgment of dismissal entered. The only pleadings considered on the hearing were the complaint and demurrer. While it is true the general demurrer admitted as true every allegation of the complaint, it contains no allegation that a necessity existed for the appointment of said deputy, and no allegation that the county commissioners found that a necessity existed for the appointment of said deputy, or that the business of said office required such appointment. The complaint must contain a statement of the facts constituting the cause of action in ordinary and concise language; and one of the ultimate facts that the board must find in such a case, before it is authorized to empower the sheriff to appoint a deputy, is that the business of the office requires it, or, in other words, that a necessity exists for the appointment. (*Meller v. Board*, 4 Idaho, 44, 35 Pac. 712.)

Opinion of the Court—Huston, C. J., Dissenting.

After a careful consideration of the allegations of the complaint, we are unable to find any allegation that there was a necessity for the appointment of said deputy, or that the commissioners found that such a necessity existed. It is true it is alleged that said board examined the books of said sheriff to ascertain the volume of business transacted in said sheriff's office, and that said sheriff was duly sworn and examined as a witness on his own behalf. It is also alleged that said board, being fully advised in the premises, did make an order empowering the plaintiff to appoint a deputy for his office at Caldwell, etc. This is not a sufficient or any allegation that said board found that the business of said office required the appointment of a deputy sheriff. It may be argued that it is a reasonable inference from the facts alleged that the county commissioners did find that such necessity existed, and, if they had not, they would not have authorized the appointment. The material allegations of a complaint must be alleged, and not left to be inferred from other facts alleged. Under the provisions of said section 6 of article 18 of the constitution, before the county commissioners can legally authorize the appointment of a deputy, they must determine whether the business of the office requires a deputy; and, in a suit like the one at bar, the complaint must allege that the commissioners found that the business of the office required the appointment of a deputy. That fact will not be inferred from the allegation that the board empowered the sheriff to appoint a deputy. In the determination of this case, it is not necessary for us to determine whether the county would be liable under any state of facts for the salary of a deputy appointed under the provisions of section 6 of article 18 of the constitution, and we do not do so. The judgment of the court below is affirmed, with costs of this appeal in favor of the respondent.

Quarles, J., concurs.

HUSTON, C. J., Dissenting.—I find myself unable to agree with my brothers in the conclusions they have reached in this case. The record shows that the sheriff made application to the board of commissioners for authority to appoint a deputy. Thereupon the board instituted an inquiry to ascertain if a ne-

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cessity for such appointment existed. They examined the sheriff, under oath. They examined the books and records of the sheriff's office, and, after due deliberation and consideration, made the requisite order authorizing the sheriff to make the appointment, and fixed the compensation. It seems to me there was a sufficient compliance with the requirements of the statutes, although the record did not contain the averment that "a necessity existed" for such appointment.

(February 9, 1899.)

IDAHO GOLD REDUCTION COMPANY v. CROGHAN.

[56 Pac. 164.]

PLEADING—MISJOINDER OF PARTIES.—Where a corporation has passed into the hands of a receiver, it is error to join such corporation with the receiver in an action to recover money alleged to be due said receiver.

SAME—LIABILITY OF POSTMASTER—OFFICIAL BOND.—While a postmaster is liable to private parties for money or property coming to his hands as such postmaster, and lost through wrongful act, neglect or default, of such postmaster, his assistants or servants, an action to recover the same should be brought against the postmaster, and not upon his official bond.

(Syllabus by the court.)

APPEAL from District Court, Lemhi County.

Redwine & Boyd, for Appellants.

The demurrer of Croghan as to a misjoinder of parties plaintiff should have been sustained. The corporation, which had no right of action in itself, and whose affairs were entirely in the hands of a receiver was joined as plaintiff with Allan, as receiver. It requires no argument to show that this was clearly a misjoinder; that it is a fatal error. (Stephen on Pleading, 3d American ed., 26; 17 Am. & Eng. Ency. of Law, 607; *Dias v. Phillips*, 59 Cal. 293; *Tell v. Gibson*, 66 Cal. 247, 5 Pac. 223.) We contend that the complaint does not state a cause of action for the reason that, it not appearing

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from the complaint that the defendant Croghan executed the bond, the action must be in tort, and he must be sued upon this exactly as a person who was not an officer, and the same allegations must be made in the complaint. (*Sacramento v. Dunlap*, 14 Cal. 421.)

A. B. Gough, for Respondents.

The court did not err in overruling the demurrer to the misjoinder of parties plaintiff. (*Mitchell v. Cline*, 84 Cal. 409, 24 Pac. 164.) If error at all, it was harmless. The defendants were not injured by reason of same. It is a joint judgment in favor of plaintiffs; therefore, a bar to another action by either of them against defendants on the same cause, and for this reason cannot be prejudicial to defendants. (*White v. The Mary Ann*, 6 Cal. 462, 65 Am. Dec. 523.) The real question in this case is, whether or not Croghan's bondsmen are liable for his breach of an official duty. Croghan, as such postmaster, is certainly liable. (Cooley on Torts, sec. 391; *Teall v. Felton*, 1 N. Y. 537, 49 Am. Dec. 352, 12 How. (U. S.) 284.) The bond of a postmaster is conditioned that he will faithfully discharge all of the duties imposed upon him by law or by the rules and regulations of the postoffice department. (U. S. Rev. Stats., sec. 3834; Murfree on Official Bonds, sec. 276; 18 Am. & Eng. Ency. of Law, 850.)

HUSTON, C. J.—This is an action brought by the plaintiffs against the defendants upon the bond of the defendant Croghan as postmaster, and the other defendants as sureties on such bond to recover the sum of \$500 alleged to have been converted by the defendant Croghan while he was postmaster at Gibbonsville, Lemhi county, Idaho, and which was alleged to be the money and property of plaintiffs. Defendant Davis was not served. Defendants Croghan and Maydole filed separate demurrers, setting up various grounds: 1. Misjoinder of parties plaintiff; 2. Misjoinder of parties defendant; 3. Ambiguity; 4. Complaint does not state facts sufficient to constitute a cause of action. Demurrers were all overruled, and the defendants Croghan and Maydole answered. The case

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was tried before the court with a jury, who returned a verdict for plaintiffs for the sum of \$500, and judgment was entered thereon, from which judgment this appeal is taken.

The errors assigned go to the overruling of the demurrers, and, we think, are all well taken. The joining of the corporation with the receiver, the corporation having passed into the hands of a receiver, was error. The corporation was no longer capable of suing or of being sued. Its suable functions were merged in the receiver. As suggested by counsel it would be as proper to join the deceased as plaintiff in an action by the administrator of his estate.

We know of no law authorizing the bringing of suit upon a postmaster's bond by a private party. It could only be done by virtue of some statute of the United States, and we know of no such statute. The statutes of the United States (U. S. Rev. Stats., sec. 784), provide for the bringing of action upon the bond of a marshal, by any person injured by a breach of the condition of such bond; but no such provision is made as to the bond of a postmaster. Again, it is not alleged in the complaint that the defendant Croghan ever gave any bond. The allegation in the complaint, after stating that "the defendant George Croghan had been and was the duly appointed and qualified and acting postmaster of the town of Gibbonsville, Lemhi county, Idaho," proceeds: "That before entering upon his duties as such postmaster, and in consideration of his appointment to said office, the defendants William Davis and B. A. Maydole, on or about the fifteenth day of October, 1895, and within two years prior to the twentieth day of March, 1896, duly made, executed, and entered into an obligation and official bond, pursuant to the provisions of section 3834 of the Revised Statutes of the United States," etc. The bond is not otherwise set forth, nor is any copy of bond annexed to the complaint. It does not appear from the complaint, otherwise than by the reference to the Revised Statutes of the United States, to whom the bond was given, or what were the conditions thereof. Section 403 of the United States Revised Statutes requires that all bonds taken by the post-

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office department shall be made to the United States of America. If Croghan did not execute the bond, then it was not such a bond as is provided for by section 3834 of the United States Revised Statutes.

That an action can be brought upon the official bond of a postmaster by a private party alleged to be injured by the wrongful conversion, by the postmaster, of moneys belonging to such private person, and that without setting forth or producing the bond, or a copy of it, in the record, is a proposition of which we can find no authority. That the postmaster is liable to a private person for money or property lost through the negligence or wrongful act of the postmaster or his assistants or servants is, we think, established by the authorities; but we have found no case where such recovery was had or sought by action upon the postmaster's bond to the United States. (*Bishop v. Williamson*, 11 Me. 495; *Bolan v. Same*, 1 Brev. 181; *Coleman v. Frazier*, 4 Rich. 146, 53 Am. Dec. 727; *Christy v. Smith*, 23 Vt. 663.) The judgment of the district court is reversed, and the cause remanded, with instructions to the district court to sustain the demurrers of defendants. Costs to appellants.

Sullivan, J., concurs.

Quarles, J., having been of counsel, took no part in the decision of this case.

(February 10, 1899.)

OLLIS v. ORR, ADMINISTRATOR.

[56 Pac. 162.]

PLEADINGS—JUDGMENT.—A complaint which attacks a judgment is void solely upon the ground that the affidavit on which order for publication of summons was made "was insufficient" does not state facts sufficient to constitute a cause of action to have such judgment adjudged void, and such complaint, when unaided by affirmative allegation in the answer will not support a judgment for the plaintiff.

Argument for Appellants.

SAME.—On appeal, a judgment in favor of the defendant will not be disturbed where the complaint fails to state a cause of action.

PUBLICATION OF SUMMONS.—Allegations that a "judgment is void," and that an affidavit for publication of summons is "insufficient," are statements not of fact, but of legal conclusions.

PRESUMPTIONS AS TO REGULARITY.—Every presumption and intendment of law is in favor of the regularity of a judgment of a court of general jurisdiction, and to overcome such presumption, in a suit brought to have such judgment declared void, facts must be alleged and proven showing wherein the court failed to obtain jurisdiction to render the judgment which is so attacked.

(Syllabus by the court.)

APPEAL from District Court, Bingham County.

W. T. Reeves and Chalmers & Ryan, for Appellants.

The record is defective in the following particulars, many of which are substantial and fatal, viz.: The summons does not specify with any degree of certainty what action would be taken if the defendant defaulted. (Rev. Stats., sec. 4140, sub. 4; *Dyas v. Keaton*, 3 Mont. 498; *Ward v. Ward*, 59 Cal. 139; *Atchison etc. R. Co. v. Nicholls*, 8 Colo. 189, 6 Pac. 512.) The affidavit for publication of summons fails to state that any complaint had been filed or any summons thereon issued, or the purpose of the suit, if any, or what effort had been made or diligence used to obtain personal service, or where defendant then resided, or what return, if any, was made on the summons, or that any cause of action existed, or what it was, or that the defendant was a necessary or proper party, or the facts showing that personal service could not be made. (Rev. Stats., sec. 4145; 3 *Estee's Pleadings*, 4th ed., secs. 3935, 3936, and cases cited; *Forbes v. Hyde*, 31 Cal. 342.) The record does not show the entry of default, by the clerk or otherwise than by way of recital in the judgment, and if entered at all it may have been premature. (Rev. Stats., sec. 4456; *Palmer v. McMaster*, 8 Mont. 186, 19 Pac. 585.) The default when taken is an essential part of the judgment-roll. (Rev. Stats., sec. 4456; *Palmer v. McMaster*, 8 Mont. 186, 19 Pac. 585; *Strode v. Strode*, ante, p. 67, 52 Pac. 161.) This is not a collateral, but a direct, attack upon the judgment in

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Orr & Orr v. Ollis (12 Am. & Eng. Ency. of Law, 147, note j), and therefore authorities upon collateral attacks are not in point. (*McKinley v. Tuttle*, 42 Cal. 571; *Vaule v. Miller*, 69 Minn. 440, 72 N. W. 452.) Courts of equity have always entertained actions for this purpose where the judgment was obtained by fraud, accident, mistake, or without service of process upon the defendant: (3 Estee's Pleadings, 4th ed., sec. 4828b, and cases cited; *People v. Thomas*, 101 Cal. 571, 36 Pac. 10; *Hurlburt v. Thomas*, 55 Conn. 181, 3 Am. St. Rep. 43.) Records import absolute verity only when it appears that the defendant was within the territorial jurisdiction of the court. (*Galpin v. Page*, 18 Wall. 350; S. C., 33 Saw. 93, Fed. Cas. No. 5206; *Palmer v. McMaster*, 8 Mont. 186, 19 Pac. 585; Freeman on Judgments, 3d ed., sec. 125; *Clark v. Thompson*, 47 Ill. 25, 95 Am. Dec. 457; *Belcher v. Chamber*, 53 Cal. 635.) The rule upon the question of presumption and impeachment in these matters, which is supported by the great weight of authority upon which the appellants rely, and to which we respectfully invite the attention of this court, is laid down in *Pennoyer v. Neff*, 95 U. S. 714; 3 Estee's Pleadings, 4th ed., secs. 4754, 4828, notes a, b, d, e, and citations; *Goodale v. Coffee*, 24 Or. 346, 33 Pac. 990; *Willamette R. E. Co. v. Hendrix*, 28 Or. 485, 52 Am. St. Rep. 800, 42 Pac. 514; *Alderson v. Marshall*, 7 Mont. 288, 16 Pac. 576; *Palmer v. McMaster*, 8 Mont. 186, 19 Pac. 585; *Galpin v. Page*, 8 Wall. 350; S. C., 33 Saw. 93, Fed. Cas. No. 5206; *Strode v. Strode*, ante, p. 67, 52 Pac. 161; *Neff v. Pennoyer*, 3 Saw. 274, Fed. Cas. No. 10,083.)

Sample H. Orr and Dietrich & Stevens, for Respondents.

A judgment is void upon its face when the fact is made apparent by an inspection of the judgment-roll. (*Jacks v. Baldez*, 97 Cal. 91, 31 Pac. 899; *People v. Harrison*, 84 Cal. 607, 24 Pac. 311; *People v. Thomas*, 101 Cal. 571, 36 Pac. 10.) Hence, if the entry of judgment be regular, and other portions of the judgment-roll affirmatively show lack of jurisdiction, the judgment would be void upon its face, and would

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not even cast a cloud upon the title of the property sold under it. In other words, it became necessary for the plaintiffs in stating a cause of action, to quiet title, to allege the regularity of the judgment, and hence the judgment-roll upon its face, and such is, in substance, the allegation in the complaint; and such was the intention of the pleader, for, upon being required to make the complaint more definite and point out the defect upon which reliance was to be placed, the pleader went outside of the judgment-roll, and attacked only the affidavit for the order of publication. That the affidavit for order of publication is not a part of the judgment-roll must be admitted. (See Rev. Stats., sec. 4456; *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742, and note; *Sharp v. Daugney*, 33 Cal. 505; *People v. Thomas*, 101 Cal. 571, 36 Pac. 10.) An affidavit for publication which states jurisdictional facts only by general inference, renders the judgment not void, but voidable. (*Raymond v. Nix*, 5 Okla. 656, 49 Pac. 1110; *Long v. Fife*, 45 Kan. 271, 23 Am. St. Rep. 724, 25 Pac. 594; *Shippen v. Kimball*, 47 Kan. 173, 27 Pac. 813; *Washburn v. Buchanan*, 52 Kan. 417, 34 Pac. 1049; *DeCorvet v. Dolan*, 7 Wash. 365, 35 Pac. 72, 1072.) And note that the affidavits in these cases are even less satisfactory than the one in question. (See, also, *Miller v. Brinkerhoff*, 4 Denio, 118, 47 Am. Dec. 242; *Staples v. Fairchild*, 3 N. Y. 41, 46.) *Gregory v. Ford*, 14 Cal. 139, is a case involving a record similar to this. The court says: "A defendant having no defense to an action cannot go into equity and enjoin a judgment by default on the ground that the sheriff's return of service on him is false, and that, in fact, he had no notice of the proceeding." (See same case with note in 73 Am. Dec. 639.) The same doctrine is announced by the same court in *Harnish v. Bramer*, 71 Cal. 155, 11 Pac. 888, and from innumerable authorities we cite the following: *Harman v. Moore*, 112 Ind. 221, 13 N. E. 718; *Woods v. Brown*, 93 Ind. 164, 47 Am. Rep. 369; *Gifford v. Morrison*, 37 Ohio St. 502, 41 Am. Rep. 537; *Piggott v. Addicks*, 3 G. Greene, 427, 56 Am. Dec. 547; *Poor v. Tuston*, 53 Kan. 86, 35 Pac. 792; *Janes v. Howell*, 37 Neb. 320, 40 Am. St. Rep. 494, 55 N. W.

Agrees in Deposition.

Quesada v. The N. Am. & Eng. Exch. of L.A., 125 Cal. 311, 312, 313, and therein authorities upon collateral attacks are set in point. (Hindley v. Tuttle, 42 Cal. 571; Vail v. Wiles, 63 Min. 446, 22 N. W. 432.) Courts of equity have also sustained actions for this purpose where the judgments obtained by fraud, accident, mistake, or without serious proof upon the defendants: (3) *Exon's Petition*, 24 Cal. 489, and cases cited; *People v. Thomas*, 141 Cal. 36, 70 Pac. 10; *Harbert v. Thomas*, 33 Cal. 187, 7 Am. Rep. 41. Recent reports sustain every right of a party that the defendant was within the territorial jurisdiction of the court. (*Galien v. Pope*, 15 Wall. 330, 5 U. S. 330, 51 Fed. Cas. No. 3306; *Primer v. McManis*, 13 Cal. 350, 351; *Primer on Judgments*, 3d ed. 340; *Clark v. Thompson*, 45 Ill. 55, 45 Am. Dec. 47; *McCluskey v. Chandler*, 33 Cal. 433.) The rule upon the question of suspension and impairment in these matters was pointed by the great weight of authority upon collateral attack, and is stated as respectfully approved of the court, in *Galien v. Pope*, 15 Wall. 330, 5 U. S. 330, 51 Fed. Cas. No. 3306, 489, 490, 491, and 492; *Galien v. Pope*, 34 Or. 346, 51 Am. Reports 2, 21 Or. 40; *Exon v. Exon*, 35 Or. 455, 51 Am. Rep. 300, 51 Pac. 324; *Linton v. Marshall*, 71 Min. 35, 36 Pac. 330; *Primer v. McManis*, 6 Mont. 136, 19 U. S. 330; *Galien v. Pope*, 15 Wall. 330, 5 U. S. 330, 51 Fed. Cas. No. 3306; *Smith v. Smith*, 100 U. S. 47, 51 Fed. Cas. No. 10002.

Sample II. On and Before 1st Street, for Deposition.

A judgment is not upon its face when the judgment is supported by an affidavit of the judgment creditor. (*Galien v. Pope*, 15 Wall. 330, 5 U. S. 330, 51 Fed. Cas. No. 3306; *Primer v. McManis*, 13 Cal. 350, 351; *Primer on Judgments*, 3d ed. 340; *Clark v. Thompson*, 45 Ill. 55, 45 Am. Dec. 47; *McCluskey v. Chandler*, 33 Cal. 433.) The rule upon the question of suspension and impairment in these matters was pointed by the great weight of authority upon collateral attack, and is stated as respectfully approved of the court, in *Galien v. Pope*, 15 Wall. 330, 5 U. S. 330, 51 Fed. Cas. No. 3306, 489, 490, 491, and 492; *Galien v. Pope*, 34 Or. 346, 51 Am. Reports 2, 21 Or. 40; *Exon v. Exon*, 35 Or. 455, 51 Am. Rep. 300, 51 Pac. 324; *Linton v. Marshall*, 71 Min. 35, 36 Pac. 330; *Primer v. McManis*, 6 Mont. 136, 19 U. S. 330; *Galien v. Pope*, 15 Wall. 330, 5 U. S. 330, 51 Fed. Cas. No. 3306; *Smith v. Smith*, 100 U. S. 47, 51 Fed. Cas. No. 10002.

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965; *White v. Crow*, 110 U. S. 183, 4 Sup. Ct. Rep. 71; *Massachusetts Ben. Assn. v. Lohmiller*, 74 Fed. 23; *Pilger v. Torrence*, 42 Neb. 903, 61 N. W. 99; *John V. Farwell Co. v. Hilbert*, 91 Wis. 437, 65 N. W. 172; *Crocker v. Allen*, 34 S. C. 452, 27 Am. St. Rep. 831, 13 S. E. 650.

QUARLES, J.—This action was commenced by the appellants to obtain a decree declaring a certain judgment, execution sale of certain lands, and a sheriff's deed therefor to the defendants, to be void. The judgment attacked was rendered April 13, 1893, in the district court in and for Bingham county; the execution sale thereunder was made May 27, 1893; and the sheriff's deed bears date December 24, 1894. The judgment is attacked on the idea that the court did not obtain jurisdiction of the person of the defendant therein, Daniel Ollis, the ancestor of the appellants. The complaint is very meager, and that part which attacks the judgment is as follows, to wit: "That heretofore, to wit, on the seventh day of October, 1892, and during the lifetime of said Sample Orr, a firm composed of Sample Orr and Sample H. Orr, doing business at Blackfoot, Idaho, under the firm name of Orr & Orr, began an action in this court against Daniel Ollis, claiming that the said Daniel Ollis was indebted to said firm; that the summons in said cause was not served on the said Daniel Ollis, but an attempted service was made by the publication of said summons in the 'Blackfoot News,' a newspaper published at Blackfoot, Idaho, but that the affidavit on which said service was ordered was insufficient, and the order is and was unauthorized and void; and that without the service of summons, and without the said Daniel Ollis being before the court, and without an opportunity to be heard, a judgment in said cause was attempted to be taken and filed herein, on the thirteenth day of April, 1893."

It will be seen that the complaint states no fact showing want of jurisdiction in the court to render the judgment attacked. It states enough to show that the defendant was not actually served with summons, and that an attempt was made to obtain constructive service. The alleged failure of the court

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to obtain jurisdiction of the person of the defendant is based upon the allegation that "the affidavit on which said service was ordered is insufficient, and the order is and was unauthorized and void," which is not a statement of facts, but of conclusions of law. The complaint did not state a cause of action. It would not support a judgment in favor of the plaintiffs.

The motion for a new trial by the plaintiffs, appellants here, was properly denied, if for no other reason, for the reason that the complaint did not state a cause of action, and would not, therefore, support a judgment in favor of the plaintiffs. The district court is a court of general jurisdiction. Every presumption and intendment of law is in favor of the regularity of a judgment of a court of general jurisdiction, and to overcome such presumption, in a suit brought to have such judgment declared void, facts must be alleged and proven showing wherein the court failed to obtain jurisdiction to render the judgment which is so attacked. This was not done in the case at bar; wherefore the judgment and the order denying a new trial are both affirmed, with costs of appeal to respondents.

Huston, C. J., and Sullivan, J., concur.

(February 11, 1899.)

BROSSARD v. MORGAN.

[56 Pac. 163.]

NEW TRIAL—MOTION TO CORRECT DECREE.—An order granting a new trial will not be reversed on appeal, unless it is made to appear that there has been a manifest abuse of discretion in granting a new trial.

(Syllabus by the court.)

APPEAL from District Court, Bannock County.

John T. Morgan and Dietrich & Stevens, for Appellant.

Argument for Respondents.

In this cause there is no necessity for a new trial, as the decree is subject to the control of the court, and may be changed or altered by the court if he shall deem it necessary to correct it, to make it conform to the facts and the law. (Idaho Rev. Stats., sec. 4229; *McMillian v. Woolley*, ante, p. 36, 51 Pac. 1029, 1032.) Where an erroneous judgment or decree has been entered, the proper practice is to make a motion to correct or modify the erroneous judgment or decree. Such application should be made within six months after the judgment was entered. (Idaho Rev. Stats., sec. 4229; *State v. Eves*, ante, p. 144, 53 Pac. 543.) The right of the first appropriator of water on the public lands may be lost by adverse possession of another, and where other person has had the continued, uninterrupted and adverse enjoyment of water for a sufficient length of time, the law will presume a grant of the right so held and enjoyed by him. (*Union Water Co. v. Crary*, 25 Cal. 504, 85 Am. Dec. 145; *Smith v. Logan*, 18 Nev. 149, 1 Pac. 678.) Five years' adverse possession is sufficient to bar an action to enforce a water right. (*Evans v. Ross* (Cal.), 8 Pac. 88; *Pomeroy on Riparian Rights*, sec. 137; *Kleyenstuber v. Robinson* (Ariz.), 52 Pac. 1117.) If a proprietor has made a special use of water by diverting it, and made a continuous and adverse use for the period of time prescribed by statute of limitation for entry on land, a grant will be presumed for such use. (28 Ency. of Law, 1002; *Bealy v. Shaw*, 6 East, 208; *Balston v. Benstead*, 1 Camp. 463; *Cowell v. Thayer*, 5 Met. (Mass.), 253, 38 Am. Dec. 400.)

W. T. Reeves, Hawley & Puckett and W. E. Borah, for Respondents.

We call attention in the first instance to the well-established rule, which is to the effect that it had been uniformly held that a motion of a new trial on the ground of insufficiency of evidence to justify the verdict or decision is addressed to the sound, legal iscretion of the court below, an that on appeal from an order granting new trial, the appellate court will not reverse the order unless it appears that there has been a manifest abuse of discretion. In view of the fact that both parties

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were dissatisfied, either with the findings or the decree, as appears from the records and brief, it would seem that, in this case, there could be no possible abuse of discretion. (*Pico v. Cohn*, 67 Cal. 258, 7 Pac. 680; *Pacific R. M. Co. v. Tel. Co.*, 79 Cal. 340, 21 Pac. 840; *Breckinridge v. Crocker*, 68 Cal. 403, 9 Pac. 426; *Phelps v. Mining Co.*, 39 Cal. 410; *Pierce v. Schaden*, 55 Cal. 406.)

SULLIVAN, J.—This is an appeal from an order granting a new trial. It appears that, after the motion for a new trial was made, the appellant, who was the defendant, interposed a motion to correct the decree, so as to make it contain the following, to wit: "That the said John T. Morgan, is entitled to, and adjudged and decreed the right to, the use of one-third of the water of Stockton creek, by prescription." The record does not inform us whether said motion was passed upon by the court. The motion for a new trial was granted, which resulted in a denial of the motion to correct the decree. The judgment and decree must be supported by the findings of fact, and we search the record in vain for a finding of fact that would support a decree such as is demanded by appellant's said motion. The court finds the rights of respondents Brossard, Vanness and Hadley to the use of water awarded to them to be prior to appellant's right. Before the decree could be changed, as suggested by said motion, the findings of fact made by the court, and the conclusions of law drawn therefrom, must be radically changed. If the decree were changed as suggested by appellant, the record would be very peculiar. We would have findings of fact and conclusions that would not support the judgment and decree, but in direct conflict with them; and the well-established rule that the judgment must be supported by the findings of fact would be set at naught. It is the duty of the trial court to find the facts. This court has no authority in that regard, and, if new or different findings of fact are necessary, a new trial may be granted.

This appeal is from the order granting a new trial, and the only question before us is whether the court erred in making
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said order. The rule is well established that an order granting a new trial will not be reversed, on appeal, unless it is made to appear that there has been a manifest abuse of discretion in making such order. Section 657 of the Code of Civil Procedure of California is the same as section 4439 of the Revised Statutes. See notes and authorities cited in Deering's Code, under said section 657. (*Pico v. Cohn*, 67 Cal. 258, 7 Pac. 680; *Pacific Rolling-Mill Co. v. Telegraph Hill R. Co.*, 79 Cal. 340, 21 Pac. 840.) As the record fails to show any abuse of discretion in making said order, the action of the court or judge in granting the new trial must be sustained. Costs of appeal are awarded to respondents.

Huston, C. J., and Quarles, J., concur.

(February 13, 1899.)

FREMONT COUNTY v. BRANDON.

[56 Pac. 264.]

COUNTY COMMISSIONERS—VOID ORDER—COLLATERAL ATTACK.—An order allowing a county officer compensation to which he is not entitled by law, made by a board of county commissioners, is void for want of jurisdiction, and may be attacked collaterally.

LIMITATION AGAINST COUNTY.—Limitation does not run against a county to recover public money wrongfully withheld by one of its fiducial agents.

PLEADING.—It is not necessary to allege specific acts of fraud or deception in the complaint in an action brought by a county to recover back money allowed a county officer as compensation in violation of law.

FEES—DEED TO COUNTY.—Tax collectors are not entitled to a fee for making a deed to the county for property sold for delinquent taxes, and struck off to the county.

DEPUTIES OR CLERKS TO ASSESSOR.—Assessors and collectors are not entitled to deputies or clerks at the public expense.

TAX COLLECTORS—COMMISSIONS—SCHOOL MONEY.—Tax collectors are not entitled to commissions on school money collected under the general county levy.

(Syllabus by the court.)

Argument for Appellant.

APPEAL from District Court, Bingham County.

John A. Bagley and Hawley & Puckett, for Appellant.

Can a recovery be had by a county where its regularly authorized officers have, through mistake of law and not through fraud, deception or any unlawful means, settled or allowed an account to an officer, which he was not entitled to receive? (*Painter v. Polk Co.*, 81 Iowa, 242, 25 Am. St. Rep. 489, 47 N. W. 65; *Badeau v. United States*, 130 U. S. 439, 9 Sup. Ct. Rep. 579; *La Salle County v. Milligan*, 143 Ill. 321, 32 N. E. 196; *Randall v. Lyon Co.*, 20 Nev. 35, 14 Pac. 583; *Brumagim v. Tillinghast*, 18 Cal. 269, 79 Am. Dec. 176; *Clark v. Dutcher*, 9 Cow. 674; *Mackey v. Fullerton*, 7 Colo. 556, 4 Pac. 1198.) The principle underlying this contention is, that a county is upon the same footing as an individual, and it is wholly settled that if an individual voluntarily pays a demand made unjustly upon him, he cannot recover back his money, unless there is fraud. (*Benson v. Monroe*, 7 Cush. 125, 54 Am. Dec. 716; *Christie v. Sullivan*, 15 Cal. 337; *Valley Ry. Co. v. Lake Erie Iron Co.*, 46 Ohio St. 44, 18 N. E. 486; *Flower v. Lance*, 59 N. Y. 603.) Can any action for moneys paid by a county to its officers through fraud, deception or other unlawful means be maintained unless such unlawful means are set forth in the complaint? In alleging fraud, it is well settled, both at law and in equity, that the mere general averment, without setting out the facts upon which the fraud is based, is insufficient. (*Cohn v. Goldman*, 76 N. Y. 284; *Jasper v. Hamilton*, 3 Dana (Ky.), 280; *People v. McKenna*, 81 Cal. 158, 22 Pac. 488; *Burris v. Adams*, 96 Cal. 664, 31 Pac. 565; *People v. Supervisors*, 27 Cal. 655; *Snow v. Halstead*, 1 Cal. 359; 9 Ency. of Pl. & Pr. 686 et seq.) Does the statutes of limitations apply to dealings between a county and its officers? (*Ada County v. Ellis*, 5 Idaho, 333, 48 Pac. 1071.) A municipal corporation has the legal right to avail itself of the defense of the statute of limitations as fully as any other creditor. It is a privilege personal to the debtor, and whenever in any legal proceeding it is invoked by the debtor, the court is compelled to recognize it as a proper defense. (*Bates v. Gregory*, 89 Cal. 398, 26 Pac. 891; *Teass v. St. Albans*, 38 W. Va. 1, 17 S. E. 400, 19 L. R. A. 802.)

Argument for Respondent.

S. H. Hays, Attorney General, and F. S. Dietrich, for Respondent.

In the first place, it is to be remembered that this action is by a public corporation against a public officer, on account of matters relating to public property held in trust and of public interest. A public officer is a trustee, not by statute, but from the very nature of things. Office implies the fiduciary relation, and the first without the second is an impossible conception. Plaintiff, without attempting to allege or prove actual fraud, relied upon the doctrine of *Ada County v. Gess*, 4 Idaho, 611, 43 Pac. 71, Statute of limitations—to what extent does it apply to a county? Remembering that this is an action by a county, against its public officer, relating to public money held in trust, and of public interest we quote from *Elmore Co. v. Alturas Co. Commrs.*, 4 Idaho, 145, 37 Pac. 349: "It is a principle of the common law that the government, and, therefore, by parity of reasoning, a county, cannot be guilty of laches. . . . Agents of the county are not acting for themselves, but for the the county, and therefore the county is not barred by their neglect." As the defendant received the moneys collected by him, and held the same in trust for the county, the action is not barred. No demand was made until the day before suit. (*San Luis Obispo Co. v. King*, 69 Cal. 531, 11 Pac. 178.) The action of the board in allowing the \$500 warrant "is void, and may be attacked directly, indirectly or collaterally at any time or place." (*Dunbar v. Board*, 5 Idaho, 407, 49 Pac. 412.) How counsel can cite section 6, article 18, of the constitution to fortify their claim that such allowances are legal or justifiable we are unable to see. As we read this section, providing as it does for clerical assistance to certain officers, among whom, however, is not the assessor, it is conclusive against the legality of the allowance. (*Ada Co. v. Ryals*, 4 Idaho, 365, 39 Pac. 556.) May the assessor and collector hold out his commissions, or must he present a bill, and have the same allowed by the board? The constitution seems to contemplate that fees and commissions, when received as such from private persons, are simply held and accounted for up to the officer's maximum. (*Guheen*

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v. Curtis, 3 Idaho, 443, 31 Pac. 805; *Moscow v. Latah Co.*, 5 Idaho, 36, 46 Pac. 874.)

QUARLES, J.—This action was commenced September 17, 1897, by the respondent, Fremont county, as plaintiff, in the district court, in said Fremont county, to recover judgment against the defendant Jesse C. Brandon, appellant here, for moneys alleged to have been received by said appellant, as assessor and collector for said county, between the fourteenth day of March, 1893, and the eleventh day of January, 1897, in the sum of \$10,638.52. The defendant demurred to the complaint, and the demurrer was overruled; whereupon the defendant answered, denying specifically the allegations showing indebtedness, and pleading the statute of limitations. The cause was, on motion of defendant for a change of venue, removed to Bingham county, and there tried before the court and a jury, and a verdict rendered in favor of the plaintiff, and against the defendant, for the sum of \$3,223.82, upon which verdict judgment was duly entered. This appeal is from the judgment and upon the judgment-roll. In defendant's bill of exceptions we find a stipulation as to some of the facts in controversy, but the evidence in full is not before us. The brief of appellant specifies twenty-two errors, but argues the same under five propositions, which we will now consider.

The first one is as follows: "Can a recovery be had by a county where its regularly authorized officers have, through mistake of law, and not through fraud, deception or any unlawful means, settled or allowed an account to an officer which he was not entitled to receive?" This proposition, put in the form of a question, involves an anomaly, viz., that the board of county commissioners may lawfully allow a claim which is not a lawful charge against the county. Those claims against counties which are lawful charges are specified by statute. The powers of the board of commissioners are statutory and limited. Such boards can exercise those powers only granted to them by the statute. In the case at bar the commissioners exceed their powers by allowing claims in favor of the appellant which are not county charges; for instance, the said board allowed him, and he was paid out of the county treasury, the sum of \$500, quarterly sal-

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ary for the first quarter of the year 1893. We are now asked to hold that the county cannot recover this money back from the appellant, upon two grounds—(1) that no appeal was taken from the order allowing said claim; (2) that the cause of action therefor is barred by limitation. As to the first ground, we are clearly of the opinion that the order allowing said claim for salary was not only unauthorized when made, but in contravention of section 8 of article 18 of the constitution, which provides that county officers “shall be paid by fees or commissions, or both, as prescribed by law.” The compensation of assessors and collectors is by statute, to be paid by commissions and fees. Hence the commissioners exceeded their powers when they made said order allowing him salary for one quarter, had no jurisdiction to make it, and said order did not bind the county, it being void. No appeal from such order was necessary. It could be attacked at any time, either directly or collaterally. (*Dunbar v. Board*, 5 Idaho, 407, 49 Pac. 412.) The defendant, being a fiducial agent of the plaintiff county, received said money in trust for the plaintiff, and the statute of limitations did not run against the county. (See *Elmore Co. v. Alturas Co.*, 4 Idaho, 154, 37 Pac. 349.) The county could recover back such sum from the defendant. (*Ada Co. v. Gess*, 4 Idaho, 611, 43 Pac. 71.)

On the second point urged by the defendant, we think that the allegations of the complaint stated a cause of action. The material parts of the complaint are as follows: “That at the expiration of the said period of office, to wit, January 11, 1897, of the said Brandon, assessor and collector, as aforesaid, he, the said Brandon, as assessor, owed and was indebted to the plaintiff county—on account of moneys, taxes, revenue, penalties, charges, and commissions which under the law it was his duty, as such officer, to collect, receive, account for, pay over, and disburse, and on account of public moneys collected and received by him pursuant to law, as such assessor, and on account of fees and commissions illegally held and unlawfully charged to and received from said county, by collusion with and deception of the auditing and disbursing officers thereof, after crediting said Brandon with all fees, commissions, and compensation which

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the said Brandon had the legal right to receive, retain, or charge against the plaintiff, and after crediting to him all moneys accounted for and paid over or legally disbursed by him, according to law—the sum of (\$10,638.52) ten thousand six hundred thirty-eight dollars and fifty-two cents, all of which was done, performed, and neglected by said Brandon in his official capacity as assessor and collector, as aforesaid; all the moneys referred to being public moneys, to which the duties of said office pertained. That no part of the amount due as aforesaid, at the expiration of his said term of office, has been paid to the plaintiff, or any of its officers, or to anyone for its use and benefit, but the whole thereof is still retained by said Brandon, and he has wrongfully and unlawfully converted the same to his own use and benefit; and, although demand has been made therefor by the plaintiff and its officers, said Brandon neglects and refuses to pay over said sum of \$10,638.52 or any part thereof, and the whole thereof, together with legal interest thereon, is still due and owing from defendant to plaintiff. That, at sundry times in each of said fiscal years composing said period of office, said Brandon, tax collector, neglected for a period of more than five days, and still neglects and refuses, to make the payments and settlements required in title 10 of the Political Code (Idaho Rev. Stats.).” Said complaint was not certain and specific, as it should have been; but the defendant demurred, and, by order of the court, plaintiff furnished a bill of particulars, from which, in connection with the complaint, the defendant was enabled to understand the particular item claimed by the plaintiff, and he was fully notified of the facts that would be proven against him on the trial. The complaint was sufficient without stating specific acts of fraud or deception.

Appellant claims that he was entitled to retain \$397.50 of the sum recovered, as fees for deeds that he executed to the county for property sold for delinquent taxes, and struck off to the county, under the provisions of section 1554 of the Revised Statutes. This contention cannot be sustained. Said section and amendments thereof provide fees to be paid by a redemptioner redeeming from a tax sale, but by no construction can they be

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held to authorize the payment of a fee for a tax deed by the county to the assessor and collector.

Appellant claims that certain claims allowed him for clerical assistance were due him, and that he should have been credited therewith. Such claims are not county charges. By the provisions of section 6 of article 18 of the constitution, those county officers who may be allowed deputies and clerical assistance by boards of commissioners are named, to wit, sheriff, auditor, recorder, and clerk of the district court. No other county officers are entitled, under said provisions, to deputies or clerks.

Appellant contends that he was entitled to retain commissions amounting to several hundred dollars on school moneys collected by him. It does not appear that such school moneys were special levies made by school districts; hence the act of March 6, 1891, and of March 11, 1893, have nothing to do with the question before us. By the provisions of section 623, of the Revised Statutes, assessors and collectors are prohibited from charging fees or commissions for collecting public school moneys; while, by the provisions of section 2156, of the Revised Statutes, assessors and collectors are allowed commissions on all taxes collected by them. Appellant insists that the last-named section repeals the former. We cannot so hold. The Revised Statutes were adopted as a whole, at the same time, and took effect at the same time. The two sections quoted must be construed together, and, if possible, we must give effect to both. This can be done by holding that section 623 qualifies section 2156; and we think that this was the manifest intent of the legislature. Construing both sections *supra* together, the appellant is not entitled to commissions on public school moneys collected by him. Under the views herein expressed, the instructions given were correct. The judgment is affirmed, with costs to respondent.

Huston, C. J., and Sullivan, J., concur.

Opinion of the Court.

(February 14, 1899.)

DAY v. GRIDLEY.

[56 Pac. 77.]

PRACTICE—APPEAL—DAMAGES—LACHES.—A party taking an appeal and failing to furnish a record of the case within the time prescribed by law and the rules of court, is manifestly for delay and subjects the party to damages.

APPEAL from District Court, Cassia County.

No appearance for appellant.

Guy C. Barnum, for Respondent.

No brief filed.

Per CURIAM.—Judgment was entered on September 19, 1898. Appeal was perfected by filing and serving notice of appeal, and filing undertaking on September 29, 1898. It appears by the certificate of the clerk of the district court that no transcript has ever been ordered, and no other steps taken to bring the case to this court by the appellant. Thereupon, upon motion of counsel for respondents, it is ordered that said cause be docketed and dismissed, and that the respondents have their costs; and it is further ordered that the respondents have damages to the amount of twelve per cent on said judgment, it manifestly appearing that the appeal in said cause was taken merely for delay, in accordance with section 4825 of the Revised Statutes, and rule 9 of this court (32 Pac. viii).

Argument for Respondents.

(February 14, 1899.)

WELLS v. PRICE.

[56 Pac. 266.]

SHARES OF STOCK IN CORPORATION—ATTACHMENT—EXECUTION.—

Shares of stock in a corporation can only be subjected to a debt by seizure under attachment or execution in the manner prescribed by the statutes relating to such seizure.

SAME—SHARES OF STOCK IN IRRIGATION CORPORATION NOT APPURTENANT TO LAND.—

Shares of stock owned by the execution defendant in an irrigation corporation are not appurtenant to the lands owned by such execution defendant although he irrigates such lands with water from a canal owned by such corporation.

(Syllabus by the court.)

APPEAL from District Court, Bear Lake County.

T. L. Glenn, for Appellant.

The sole and only question is, Can the lands of the plaintiff, the successor in interest of Francis Wilcox, be deprived, without his consent or the consent of his predecessor in interest, of the waters which had been regularly appropriated to them and uninterruptedly used upon them for a period of at least fourteen years? If it is real property, then the levy of the attachment issued in the action of Deere, Wells & Co. in October, 1891, seized the water rights of Francis Wilcox equally with the land, and the sheriff's deed executed in May, 1896, by relation, conveyed it to the plaintiff. (*Sharp v. Baird*, 43 Cal. 577; *Porter v. Pico*, 55 Cal. 165.) Section 2825 of the Revised Statutes of Idaho defines real property as follows: "Real property or real estate consists of lands, possessory rights to land, ditch and water rights, and mining claims both lode and placer." This question is original. There is not only a paucity of decision upon it; there is absolutely none at all. It involves simply a construction of section 4, article 15 of our constitution.

John A. Bagley, for Respondents.

What interest has a stockholder in the corporate property? How may it be attached? As to the first question, the corporation owns the property in the case at bar; the Upper South

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Field Irrigation Company owned the water. Wilcox had no title to it. (*Gorman v. Gilson*, 28 Cal. 479; *Gashwiler v. Wilks*, 33 Cal. 11; *Mickles v. Rochester City Bank*, 11 Paige, 128, 43 Am. Dec. 103, and note; *Wheelock v. Multon*, 15 Vt. 521; *Wright v. Oroville*, 40 Cal. 20.) The property of a corporation is owned by the corporation, and not by the individual members. (*Button v. Hoffman*, 61 Wis. 20, 50 Am. Rep. 131, 20 N. W. 667, and cases cited; *Baldwin v. Canfield*, 26 Minn. 43, 1 N. W. 261; *Bank v. Railroad Co.*, 13 N. Y. 599; *Brewster v. Hartley*, 37 Cal. 15, 30, 99 Am. Dec. 237; Clark on Corporations, 257; *Fisher v. Bank* 5 Gray (Mass.), 373, 377; *Burrall v. Railroad Co.*, 75 N. Y. 211, 216.) The fact that Wilcox and others appropriated these waters and used them upon their lands before the corporation was incorporated does not support plaintiff's contention. Before incorporation, the water appropriated by Wilcox and used upon his land was separate and distinct from the land—that is, he could sell the land and retain the water, or he could sell the water and retain the land. (*Oppenlander v. Left Hand Ditch Co.*, 18 Colo. 142, 31 Pac. 854; *Frank v. Hicks*, 4 Wyo. 502, 35 Pac. 475, 1025; *Bloom v. West*, 3 Colo. App. 212, 32 Pac. 846; *Strickler v. City*, 16 Colo. 61, 25 Am. St. Rep. 245, 26 Pac. 313; Pomeroy's Riparian Rights, sec. 58; Gould on Waters, 234; *Cache La Poudre Irr. Co. v. Reservoir Co.*, 25 Colo. 144, 71 Am. St. Rep. 123, 53 Pac. 318; *Ada Co. etc. Co. v. Farmers' Canal Co.*, 5 Idaho, 791, 51 Pac. 990.)

QUARLES, J.—There is only one question presented by the record in this case, to wit: Did the plaintiffs, by purchase at execution sale of the lands mentioned in the complaint, acquire with said lands, and as appurtenant thereto, the shares of stock owned by the execution defendants in that certain corporation known as the Upper South Field Irrigation Company? The allegations of the complaint, which we must consider as true, the same being confessed by the demurrer, show: That said lands were attached under a writ of attachment that issued in the action brought by said plaintiffs against said execution defendants, Francis Wilcox and George Wilcox, on the seventeenth day of October, 1891, but did not attach the shares of stock held in

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said corporation by the said execution defendants, in the manner provided by subsection 4, section 4307 of the Revised Statutes. That said action proceeded to judgment in February, 1895, and the execution sale thereunder October 28, 1895, and sheriff's deed therefor was made May 1, 1896. That, many years prior thereto, the execution defendants and other residents in the immediate vicinity jointly built and constructed a canal by which water was diverted from Paris creek, and conducted to their lands, and there used for the purpose of irrigating them for agricultural purposes. That said parties who constructed said canal organized a corporation, designated in their articles of incorporation as the Upper South Field Irrigation Company, and issued shares of capital stock to the said joint owners, in proportion to the quantity of interest each owned in said canal and the waters therein conveyed. That in the year 1895 one John A. Bagley commenced an action in the probate court of Bear Lake county against said execution defendants, and attached the shares of stock held by said defendants in said corporation, afterward obtained judgment, upon which execution issued, under which execution said shares of stock were sold, and purchased by said Bagley, who received from the sheriff a bill of sale for said stock, after which he sold and assigned said bill of sale to the defendant Robert Price, who obtained from said corporation a certificate for said shares, and who has since held and claimed the same.

The contention of plaintiffs, and the theory upon which this suit was brought, is that said shares of stock were appurtenant to said lands, and passed with said lands under execution sale. Aside from general well-established rules of law which forbid the sanction of said contention, it is directly opposed to the statutory law of this state. Under the provisions of section 4306 of the Revised Statutes, "shares which the defendant may have in the stock of any corporation or company" may be attached. Subsection 4, section 4307 of the Revised Statutes, is as follows: "Stock or shares or interest in stock or shares, of any corporation or company must be attached by leaving with the president, or other head of the same, or the secretary, cashier, or other managing agent thereof, a copy of the writ, and a notice

Argument for Appellant.

stating that the stock or interest of the defendant is attached in pursuance of such writ." By section 4477 of the Revised Statutes, "shares and interest in any corporation or company . . . may be attached on execution in like manner as upon writs of attachment." Under the provisions of these statutes, the procedure is prescribed by which shares of stock and interests in corporations may be seized and subjected to the satisfaction of the debts of the execution defendant. The subjection of shares of stock in a corporation to the payment of a debt must, when done by legal process, be done in the manner prescribed by the statutes. The complaint in the case at bar shows that the statutory procedure was not followed. Shares of stock in an irrigation corporation are not appurtenant to the land owned by the owner of such shares, even though such land be irrigated by water from a canal owned by such corporation. The court properly sustained the demurrer. The judgment of the district court is affirmed, with costs to the respondents.

Huston, C. J., and Sullivan, J., concur.

(February 15, 1899.)

STOVER v. STOVER.

[56 Pac. 263.]

DIVORCE—PLEADINGS—DECREE.—Where, in an action for divorce, the cross-complaint of defendant fails to set up a ground of divorce a decree in favor of defendant upon such cross-complaint will be set aside.

(Syllabus by the court.)

APPEAL from District Court, Blaine County.

Hawley & Puckett, for Appellant.

A judgment herein could not be entered in respondent's favor upon the pleadings. There is no cross-complaint herein. The fact that a certain portion of the answer is entitled a cross-complaint, and affirmative relief is asked, does not make it a cross-complaint, even if no objections are made to it.

Opinion of the Court—HUSTON, C. J.

(*Doyle v. Franklin*, 40 Cal. 110; *Shain v. Belvin*, 79 Cal. 262, 21 Pac. 747; *Brannan v. Paty*, 58 Cal. 330; *Mills v. Fletcher*, 100 Cal. 142, 34 Pac. 637.) The decree should be set aside, because no findings of fact and conclusions of law were made by the court. Without findings of fact and statement of conclusions of law, there is no basis to support the judgment where a case is tried by a judge, without a jury, and the record must disclose them. (*Hoagland v. Clay*, 2 Cal. 474.) It is error to enter judgment without findings where they are not specially waived. (*Bennett v. Pardini*, 63 Cal. 154; *Mace v. O'Reilley*, 70 Cal. 231, 11 Pac. 721.) Actions for divorce are chancery proceedings. Special verdicts or findings are simply advisory, and may be adopted or disregarded as the court may deem proper. (*Beck v. Beck*, 6 Mont. 318, 12 Pac. 694; *Black v. Black*, 5 Mont. 15, 2 Pac. 317; *Gilpin v. Gilpin*, 12 Colo. 504, 21 Pac. 612.) Will the findings support the judgment? We urge they will not. The findings of fact must support the judgment rendered, and should be the ultimate facts in issue. (8 Ency. of Pl. & Pr. 943, 944, and notes.) A finding that "all the material facts of the complaint are true" will not support a judgment for the plaintiff. (*Ladd v. Tully*, 51 Cal. 277; *Hardenburg v. Hardenburg*, 54 Cal. 591.) The charge of adultery must be stated with reasonable certainty as to time and place. (*Conant v. Conant*, 10 Cal. 249, 70 Am. Dec. 717.)

Bruner & Bruner, for Respondent.

No brief filed.

HUSTON, C. J.—Plaintiff brought action for divorce alleging as grounds therefor the cruel and inhuman treatment of her by defendant; also alleging adultery of defendant. Defendant answered, denying specifically all the allegations of the complaint, and alleging, by way of cross-complaint, the adultery of plaintiff. The case was tried by the court with a jury. The jury returned a special verdict, all the findings of which are in favor of the defendant and against the plaintiff. All that the record presents to this court is the com-

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plaint, answer, findings of the jury; and the decree dissolving the bonds of matrimony between the plaintiff and defendant; and awarding to the defendant the custody of three of the minor children; and to the plaintiff the custody of one minor child, all the issue of the marriage between plaintiff and defendant. The respondent (defendant below) makes no appearance and files no brief in this court. The decree states that "all the material allegations of the answer and cross-complaint are sustained by the testimony," etc. It is stated by counsel that "the charges of adultery on both sides were dropped from the case," and nothing was submitted to the jury in relation to said charges, nor does the record contain any evidence thereon. The decree was rendered upon the cross-complaint of the defendant. Said cross-complaint consists solely of allegations of the capacity of defendant to care for and maintain the children, issue of said marriage of plaintiff and defendant, and the incapacity of plaintiff to do so. The only ground for divorce stated in the cross-complaint is the charge of adultery, which it is conceded was dropped from the case. The charge of adultery in the cross-complaint is too vague and indefinite. It states neither the time when, the place where, nor the person with whom said offense was committed; nor could proof have been admitted under it, if objection had been made; but, as before stated, no proof seems to have been offered thereon. It is apparent, therefore, that there is not sufficient in the cross-complaint to support the decree. Nor is the matter helped out by the findings of the jury. Said findings simply negative the allegations of the complaint. The only affirmative finding is to the effect that the defendant has at all times used reasonable care and diligence for the comfort and welfare of the plaintiff and the children of their marriage. The judgment and decree of the district court are reversed, with costs to appellant.

Quarles and Sullivan, JJ., concur.

Argument for the State.

(February 20, 1899.)

STATE v. BAKER.

[56 Pac. 81.]

RAPE—VERDICT—EVIDENCE.—Evidence in this case examined and held not to support verdict of guilty.

(Syllabus by the court.)

APPEAL from the District Court of Ada County.

John C. Rice, H. A. Griffiths and T. D. Cahalan, for Appellant.

As the common law, where the defendant was not permitted to testify in his own behalf, the testimony of the prosecutrix alone was sufficient to sustain a conviction for rape. But under statutes making the accused a competent witness, when he avails himself of his right to testify, and explicitly denies the commission of the offense, the uncorroborated testimony of the prosecutrix is not sufficient to sustain a conviction. (7 Am. & Eng. Ency. of Law, 2d ed., 867; *Mathews v. State*, 19 Neb. 330, 27 N. W. 234; *Sowers v. Territory*, 6 Okla. 436, 50 Pac. 257; *People v. Lambert*, 120 Cal. 170, 52 Pac. 307.) Not only is the testimony of the prosecutrix uncorroborated, but it is improbable, inconsistent and self-contradictory. In those states where the unsupported testimony of the prosecutrix is sufficient to sustain a conviction, such testimony must not be inconsistent, self-contradictory or improbable. (*State v. McMillan*, 20 Mont. 407, 51 Pac. 827; *Tway v. State*, 7 Wyo. 74, 50 Pac. 189; *Sowers v. Territory*, 6 Okla. 436, 50 Pac. 257; *People v. Benson*, 6 Cal. 221, 65 Am. Dec. 506; *People v. Hamilton*, 46 Cal. 540; *People v. Ardago*, 51 Cal. 371.)

Samuel H. Hays, Attorney General, for the State.

In many cases the statute provides that there shall be no conviction on the uncorroborated evidence of the prosecutrix, but we have no such statute. Corroboration other than by the outcry or complaint of the prosecutrix is usually impossible to obtain. Such crimes are not committed publicly.

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Corroboration has been emphasized by the courts in numerous cases going to the question of consent, but where, as in this case, prosecutrix is under the age of consent, corroboration is no more of an element than in other criminal cases, with the exception, perhaps, that greater care is necessary in scrutinizing the evidence. (*State v. Wilcox*, 111 Mo. 569, 33 Am. St. Rep. 551, 20 S. W. 314; *Hamilton v. State*, 36 Tex. Cr. Rep. 372, 37 S. W. 431; *State v. Cone*, 1 Jones (N. C.), 18.)

HUSTON, C. J.—The defendant was convicted of the crime of rape, alleged to have been committed upon the person of his daughter, aged about fifteen years, and sentenced to the state penitentiary for a period of twenty-one years; from which judgment, and from the order of the court overruling his motion for a new trial, defendant appeals.

Appellant raises several objections to the constitutionality of the act under which he was indicted, both as to the sufficiency of its title and the manner of its enactment. As an examination of the record satisfies us that the judgment of the district court will have to be reversed upon the merits, and as the objections to the statute have been remedied by subsequent legislation, we do not feel called upon to discuss or pass upon those questions, but will consider the case upon its merits, as the same appear in the transcript. It is a rule, we believe, of very general recognition, that courts will not, where the decision of a case does not necessarily involve the passing upon the constitutionality of a statute, assume to do so. This court said, in *State v. Ridenbaugh*, 5 Idaho, 710, 51 Pac. 750; “An opinion *obiter* as to the validity of said act being unnecessary, all authority, as well as reason, forbid that we should express our views as to the validity of said act until that question becomes necessary in a case properly before us.” And the position taken by the court in that case is accentuated in the case at bar by the fact that the questions raised have been eliminated by the action of the legislature in re-enacting the statute. While the changing of the age within which the party against whom the offense of rape is alleged to have been committed is capable of consenting thereto has eliminated

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from the offense in such case the necessity of proving the employment of any of the various means mentioned in the statute for accomplishing such crime, and limits the proof in such cases to the committing of the act of sexual intercourse, and the age of the alleged victim, it is not to be presumed that the nature and character of the evidence essential to the establishment of the offense charged are done away with, or materially changed. The remark of Sir Mathew Hale in regard to the character of the offense of rape, that "it is an accusation easy to make, and hard to be proved, and harder still to be defended by the party accused, though ever so innocent," receives additional force by reason of such changes in the law as make that the highest grade of felony which, before such change in the statute, was, or might have been, a minor offense. It is doubly incumbent upon the courts in prosecutions for this offense under the statutes as they now stand to see to it that every element of the offense, within the narrow limits to which the proof is now confined, be established beyond a reasonable doubt, and that the rule of the statute which was enacted for the protection of female virtue be not made a means whereby the vindictive wanton may add further infamy to her iniquitous calling by making it a means of extortion and blackmail, or the medium of wreaking vengeance for some real or imaginary wrong.

We have examined the record in this case with much care. The crime charged is the most heinous known to the law. It seems a strange thing to say, but our experience almost compels us to the belief that, the more monstrous the crime charged, the more readily are juries inclined to give credence to it, and the less proof is required to establish it. In this case, the only evidence against the defendant was the testimony of the prosecutrix, a girl some fifteen years of age, and, judging from the testimony in the case, not of the most exemplary or amiable character. She is not in a single particular corroborated; on the contrary, she is flatly contradicted upon the most material points by several witnesses, no one of whom was contradicted or impeached, or sought to be. We think, before a father should be immured in a prison for what

Opinion of the Court—Sullivan, J., Concurring.

in this case virtually amounts to imprisonment for life, his conviction should be supported by something more than the uncorroborated statements of a wayward and vindictive girl, whose proclivities, it is shown by the evidence, tend not in the direction of virtue.

One of the grounds upon which a new trial was asked by the defendant was the discovery of new and material evidence, and in support of that claim the appellant files the affidavit of one Wilbur M. Guile, who testifies in said affidavit that some time in March, 1897, said Nancy Baker (the prosecutrix) said to him, in the presence of his wife, that there was no truth in the charge she had made against her father. This affidavit is supported by that of Mont Oliver, the late sheriff of Ada county, who states that he knows Wilbur Guile, who made the foregoing affidavit, and that "from my knowledge of said Guile I here declare that he is both truthful and honorable in a very high degree." We do not consider that a review of the evidence in this case would serve any good purpose. It is sufficient to say that we have carefully gone through the entire transcript, and we are compelled to say that we do not consider the verdict in this case warranted or supported by the evidence. The judgment of the district court is reversed, and the cause remanded.

QUARLES, J.—I concur in the conclusion reached in this case, but think it but right to suggest the impropriety of putting the public to the expense of again trying the defendant upon the evidence contained in the record.

SULLIVAN, J.—I concur in the conclusion reached by the majority of the court on the ground that the evidence is not sufficient to support the verdict. The judgment ought to be reversed, and the cause remanded. The question as to whether the defendant should be tried again ought to be left to the discretion of the trial court; and, unless the state can produce additional evidence of defendant's guilt, the court would be justified in discharging him.

The majority of the court hold that it is not necessary to a decision of this case before this court to pass upon the con-

Points decided.

stitutionality of the act under which the defendant was convicted and cite *State v. Ridenbaugh*, 5 Idaho, 710, 51 Pac. 750, in which the court said: "All authority as well as reason forbid that we should express our views as to the validity of said act until the question becomes necessary in a case properly before us." That case differed from the one at bar in this: It was not necessary to a proper decision of that case to pass upon the constitutionality of the act there referred to. But in the case at bar the validity of the act under which the defendant was convicted has been ably presented both by printed briefs and oral arguments of respective counsel, and is properly before this court, and, in my view of the case, ought to be decided. The validity of said act is raised in another case now pending in this court, and other prosecutions may occur under said act, regardless of the fact that said law has been re-enacted. In the case at bar the defendant was not arrested until many months after the date of the alleged commission of the crime of which he was convicted, and it may be that other acts may have been committed that would come within the provisions of said act before said re-enactment. The case at bar has been reversed and remanded, and large costs may be saved to the people by now deciding whether said act is valid or not. But, as the majority of the court think otherwise, it would answer no purpose for me at this time to present my views on the points raised as to the constitutionality of said act, and I will refrain from doing so.

(February 23, 1899.)

TAYLOR v. BARTHOLOMEW.

[56 Pac. 325.]

PLEADINGS—NONSUIT—CROSS-COMPLAINT.—In an action by the plaintiffs against numerous defendants to settle the rights of the parties to the waters of a certain stream, various defendants having, in addition to their answers to the complaint of plaintiffs, filed cross-complaints asking affirmative relief against both the

Argument for Appellants.

plaintiffs and certain of their codefendants, the plaintiffs having been nonsuited, the court, on motion of certain of the defendants, dismissed the cross-complaints of the other defendants. *Held*, error. The cross complainants were entitled to be heard upon their cross-complaints in the action then pending.

(Syllabus by the court.)

APPEAL from District Court, Cassia County.

Moyle, Zane & Costigan, for Appellants.

Whenever the defendant seeks affirmative relief against any party relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint. The cross-complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto as to the original complaint. (Idaho Rev. Stats. 1887, sec. 4188; *Van Bibber v. Hilton*, 84 Cal. 585, 24 Pac. 308, 598.) No objection can be made to the cross-complaints that new parties are named therein as parties to be brought in, for relief may be had against new parties by cross-complaint even when the statute is silent as to granting relief against persons not parties to the original suit. (*Winter v. McMillan*, 87 Cal. 256, 22 Am. St. Rep. 243, 25 Pac. 407; *Chalmers v. Trent*, 11 Utah, 88, 39 Pac. 488.) Moreover, a cross-bill is so far independent of the original bill that where the cross-bill sets up additional facts relating to the subject matter of the suit, but not alleged in the original bill, and asks affirmative relief upon grounds justifying equitable interference, a dismissal of the original bill does not dispose of the cross-bill, but that remains for disposition just as if it had been filed as an original bill. (*Markell v. Kasson*, 31 Fed. 104; *Coogan v. McCurren*, 50 N. J. Eq. 611, 25 Atl. 330; *Lowenstein v. Glidewell*, 5 Dill. 325; S. C. Fed. Cas. No. 8575; *Abels v. Mobile Real Estate Co.*, 92 Ala. 383, 9 South. 423; *Jesup v. Illinois Central R. R. Co.*, 43 Fed. 483; *Ballard v. Kennedy*, 34 Fla. 483, 16 South. 327; *Worrell v. Wade*, 17 Iowa, 96; *Ragland v. Broadnax*, 29 Gratt. 401; *West Virginia etc. L. Co. v. Vinal*, 14 W. Va. 637; *Wilson's Heirs v. Bodley*, 2 Litt. (Ky.) 55; *Wickliffe v. Clay*, 1

Argument for Respondent.

Idaho (Ky.), 585.) Cross-complaints under the code are like cross-bills, with two important exceptions, viz.: 1. A cross-bill would of course lie only in equity cases, while a cross-complaint is available in law cases as well as in equity; and 2. While a cross-bill may be made up wholly of defensive matter, a cross-complaint is by the very words of the statute proper only where affirmative relief is sought by the defendant. (*Willman v. Friedman*, 4 Idaho, 209, 38 Pac. 937.) One restriction is imposed, viz., the plaintiff cannot dismiss the action, nor submit voluntarily to a nonsuit, without the consent of the cross-complainant. (Idaho Rev. Stats. 1887, sec. 4354, subd. 1. See *Purnell v. Vaughn*, 80 N. C. 46 (counterclaim); *Allen v. Allen*, 14 Ark. 666.) The plaintiff can, however, do either of these things with the consent of the defendant, and a voluntary dismissal of his original complaint, by plaintiff, or a voluntary nonsuit by him, with the consent of the cross-complainant, leaves the issues under the cross-complaint in court for adjudication. The cross-complaint remains for disposition as though it were an original complaint, for "it is the policy of the law, as it is essential to the cause of justice, that all matters of difference between the parties should be settled in one controversy." (*Watts v. Sweeney*, 127 Ind. 116, 22 Am. St. Rep. 615, 36 N. E. 680; *Mott v. Mott*, 82 Cal. 413, 22 Pac. 1140; *Worrell v. Wade*, 17 Iowa, 96 (cross-bill); *Spearing v. Chambers*, 25 Iowa, 99; *Russell v. Lamb*, 82 Iowa, 558, 48 N. W. 939; *Jones v. Thacker*, 61 Ga. 329. See, also, *Abels v. Planters' etc. Ins. Co.*, 92 Ala. 383, 9 South. 423 (statutory cross-bill); *Crain v. Hilligross*, 21 Ind. 210; *Warner v. Darrow*, 91 Cal. 309, 27 Pac. 737; *Mott v. Mott*, 82 Cal. 419, 22 Pac. 1140.)

Hawley & Puckett and K. I. Perky, for Respondent.

The first position taken by counsel that "the cross-complaints in this case are proper cross-complaint," we do not concede. We deny that a cross-complaint in this form of action is a proper pleading, and insist, even if it is proper, still it is not necessary. Matters which are proper as a defense should be set up by answer, and not by way of cross-complaint. (*Shain v. Belvin*, 79 Cal. 262, 21 Pac. 747; *Mills v. Fletcher*, 100 Cal.

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142, 34 Pac. 637; *Wilson v. Madison*, 55 Cal. 5; *Miller v. Luco*, 80 Cal. 257, 22 Pac. 195; *Hills v. Sherwood*, 48 Cal. 386; *Doyle v. Franklin*, 40 Cal. 110.) Matters which are proper as a defense will not be turned into a cross-complaint, merely by a prayer for affirmative relief. (*Doyle v. Franklin*, 40 Cal. 110; *Brannan v. Paty*, 58 Cal. 330.) Where the original bill is dismissed as a matter not properly in court, the cross-bill is also dismissed. (*Lowenstein v. Hooker*, 71 Miss. 102, 14 South. 531.)

HUSTON, C. J.—This action was brought by the plaintiffs against some twenty-five defendants, for the purpose of adjusting and establishing the rights of the various parties to the waters of Raft river and its tributaries. The complaint sets up the claim of the plaintiffs to a certain amount of the waters of Raft river by virtue of appropriation and user since the year 1875; sets forth the description of the lands of the plaintiffs for the irrigation of which said water was appropriated and has been used since 1875; and avers the necessity of such water for the cultivation of said lands. The complaint avers that each of the defendants is located on lands situated above the lands of the plaintiffs on said Raft river, and avers that defendants have interfered with plaintiffs' right to said waters by obstructing the flow thereof by the erecting of dams and ditches on said stream, and diverting the waters thereof, and have thereby deprived the plaintiffs of the use and enjoyment of said waters to which they are entitled as aforesaid; avers that the defendants, and each of them, claim some right or interest in or to the use of the waters of said Raft river; but avers that such rights of defendants, if any they have, to the use of the waters of said river, are subsequent in time, and inferior in right and title, to the rights of plaintiffs to the use of the waters of said river. The complaint sets forth the corporate and copartnership character of certain of the defendants; demands judgment and decree establishing the priority of the rights of plaintiffs to said water over those of defendants; prays for injunction against defendants *pendente lite*, and that, upon hearing, the same be made perpetual, and for general relief. To the complaint of plaintiffs, the defendants

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who are appellants here filed their answer, denying specifically the allegations of the plaintiffs' complaint. Said defendants also allege a misjoinder of parties, in that certain other parties have or claim to have rights and interests in and to the use of the waters of the tributaries of said Raft river (it is evident that appellants mean a nonjoinder); and they aver that it is essential to the proper and complete adjustment of the questions presented in this case that said parties should be made parties to this action, and pray that they may be so joined. Said appealing defendants also file a cross-complaint wherein they set forth severally the rights of each to the use of the waters of said Raft river, and that the other defendants claim some interest in the waters of Raft river and its tributaries adverse to that of said cross-complainants, and that the plaintiffs also claim some interest in said waters of Raft river and its tributary, Cassia creek, adverse to said cross-complainants, and pray that the parties having or claiming to have interest in said waters of Raft river or its tributaries may be brought in and made parties to this action, and, when so brought in, they be required, upon service upon them of said cross-complaint, to set forth their several rights and interests in and to the waters of said Raft river and its tributaries, and that, upon the hearing of this action, the court determine and settle said adverse claims, and grant such injunction relief pending this action, and upon final hearing, as equity may require, and make such judgment as to costs as may seem equitable to the court, and for general relief. Other of the defendants filed answers and cross-complaints similar to that of appellants.

The bill of exceptions contains the following, it being expressly stipulated in open court by the attorneys for all the parties that all pleadings not for any reason answered to should be considered as denied as fully as if answers denying the allegations thereof specifically were on file in the cause, and it was so ordered: At the hearing as shown by the bill of exceptions, "after plaintiffs had rested their case, all of the defendants, including those defendants who were cross-complainants, united in a motion for a nonsuit, alleging various proper grounds of a nonsuit; and thereupon, after full argument and

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deliberation, the court granted the motion of nonsuit, and dismissed the complaint of plaintiffs." Thereupon the defendants and cross-complainants proceeded to offer evidence in support of their said cross-complaints, and the causes of action therein set forth. Thereupon objection was raised on behalf of all the defendants to said cross-complaints to the taking of any testimony on said cross-complaints on the ground that said cross-complainants had united in the motion to nonsuit the plaintiffs, and that when the court granted that motion of nonsuit against the plaintiffs, and dismissed their complaint, that disposed of the whole litigation, and for the further reason that the cross-complaints herein are causes of action allowable under the provisions of the statutes of Idaho, which objections were sustained by the court; and thereupon the court entered a judgment of dismissal of the said cross-complaints, and each and all of them, to which said cross-complainants, and each and all of them, duly excepted. From the judgment of the district court dismissing said cross-complaints, this appeal is taken.

The only question raised by this record is, Was the action of the district court in dismissing the cross-complaints of the appellants error? It is true, as claimed by respondents' counsel, that, as to cross-bills in equity, "the general rule is that the dismissal of the original bill carries with it the cross-bill, as the latter is ordinarily considered merely an auxiliary of and dependency on the original bill." (5 Ency. of Pl. & Pr. 662.) But the same authority has the following: "But when the cross-bill sets up additional facts relating to the subject matter, not alleged in the original bill, and asks affirmative relief against complainant in a matter which is the subject of the original bill in the case thus made, the dismissal of the original bill does not dispose of the cross-bill, and the latter remains for disposition as if it had been filed as an original bill." (5 Ency. of Pl. & Pr. 663, and authorities cited in note 2.) And this is the rule as to cross-complaints under the code. "A cross-complaint is not affected by a dismissal of the complaint, but remains for disposition as though it were an original complaint; and this is so even although the plaintiff is nonsuited upon the motion of the defendant." (5 Ency. of Pl. & Pr. 684.)

Points decided.

We think the rule is uniform that relief may be had against a codefendant or any party on cross-complaint, or an answer containing a cross-complaint. (5 Ency. of Pl. & Pr. 675, note 1.) The purpose of this litigation is plain. It was to settle the rights of the various parties contending, to the waters of a certain stream. The plaintiffs institute the suit, call in numerous defendants, who set up by answer their several defenses to the action of plaintiffs, and also, by cross-complaints, set up their own claims to the waters of said stream as against each other and the plaintiffs also. The plaintiffs fail in making their case, and suffer nonsuit. We have been unable to find a single authority holding that in such a case the cross-complainants—that is, the defendants who have filed cross-complaints, and are asking affirmative relief both against the plaintiffs and their codefendants—are not entitled to have such relief in this action. The judgment of the district court is reversed, and the cause remanded for further proceedings. Costs to appellants.

Quarles and Sullivan, JJ., concur.

(January 24, 1899.)

WELLS, FARGO & CO. v. ALTURAS COMMERCIAL
COMPANY (MERCHANT & CO., INTERVENERS).

[56 Pac. 165.]

CHATTEL MORTGAGE—RECORDING—ACTUAL NOTICE.—A junior mortgagee, who takes his mortgage with actual notice of the existence of another mortgage upon the same property, and with the understanding that the lien of his mortgage is subject to that of such former mortgage, is not entitled to precedence on the grounds that such former mortgage was not filed of record in the proper county recorder's office prior to the time that his mortgage was filed in such office.

SAME—GOOD BETWEEN PARTIES—GOOD AGAINST JUNIOR MORTGAGEE WHO HAS ACTUAL NOTICE.—A chattel mortgage upon a stock of merchandise, under the terms of which the mortgagor retains possession and sells in the usual course of trade, applying proceeds

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of sale less expenses thereof to the mortgage debt, is valid as between the parties and privies thereto, and as against junior mortgages of the same kind, taken with actual notice of such former mortgage.

SAME—ESTOPPEL.—A mortgagee who takes a mortgage upon a stock of merchandise, which mortgage authorizes the mortgagor to retain possession of the mortgaged chattels, and sell the same in the usual course of business, and who knows of a similar, prior existing mortgage upon the same chattels, and agrees that his mortgage lien shall be subject to the lien of such former mortgage, is estopped from questioning the validity of such former mortgage.

(Syllabus by the court.)

APPEAL from District Court, Blaine County.

Brown & Henderson and Lyttleton Price, for Appellants.

As between the different mortgagees litigating here, it is entirely immaterial as to whether these mortgages were fraudulent as to attaching creditors or not. Such a mortgage permitting the mortgagor to remain and sell the goods is not void between the parties, but may be enforced at any time by the mortgagee. (*Bank of Ukiah v. Moore*, 106 Cal. 673, 39 Pac. 1071; *People's Sav. Bank v. Bates*, 120 U. S. 556, 7 Sup. Ct. Rep. 679; *Tregear v. Etiwanda W. Co.*, 76 Cal. 538, 9 Am. St. Rep. 245, 18 Pac. 658; *Dodge v. Smith*, 5 Kan. App. 742, 46 Pac. 990; *Chicago Title etc. Co. v. O'Marr*, 18 Mont. 568, 46 Pac. 810, 47 Pac. 4; *Armstrong v. Ford*, 10 Wash. 64, 38 Pac. 867; *Wm. B. Grimes etc. Co. v. McKee*, 51 Kan. 704, 33 Pac. 594.) Such mortgages are not void as to any subsequent purchaser who takes them with notice; and these subsequent mortgagees all had notice. For the plaintiff had a right to take possession under that clause and that possession was good against any person occupying with no better right than they themselves had. (*Bank of Woodland v. Duncan*, 117 Cal. 412, 49 Pac. 414; *Park v. Parsons*, 10 Utah, 330, 37 Pac. 571; *First Nat. Bank of Okosche v. Teat*, 4 Okla. 454, 46 Pac. 474; *Whittemore v. Fisher*, 132 Ill. 243, 24 N. E. 636.) Effect of recording and not filing. The statute of Idaho in the Revised Statutes, page 181, requires these chattel mortgages to be recorded. It is said that in 1891 the statute was changed

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providing for filing and leaving the document with the recorder. But as above stated, each of the subsequent mortgagees had absolute notice. (See pp. 168, 214, 221.) No record or filing was necessary against the parties or subsequent purchasers or mortgagees having notice. (*Fette v. Lane* (Cal.), 37 Pac. 914; *American Lead Pencil Co. v. Champion*, 57 Kan. 352, 46 Pac. 696; *W. B. Grimes Dry Goods Co. v. McKee*, 51 Kan. 704, 33 Pac. 594.) Marshall Field & Co. were estopped to deny the validity of the prior mortgage which was mentioned in their mortgage and contracted to be paid therein. (*Dodge v. Smith*, 5 Kan. App. 742, 46 Pac. 991; *Leland v. Collier*, 34 Mich. 421.)

Kingsbury & Parsons, for Respondents.

The act of March 13, 1891, page 181, First Session Laws, requires that the mortgage be filed in the office of the county recorder, "to be kept there for the inspection of all persons interested; . . . provided, that if the mortgagee receive and retain actual possession of the property mortgaged, he may omit the filing of his mortgage during the continuance of such actual possession." The courts have no right, no power, to extend a statute so as to dispense with any of the conditions the legislature has seen fit to impose. If we should once begin an attempt to relieve a party in cases of hardship, the law would be in danger of being frittered away and its benefits be entirely lost to the community. Statutes of a similar character in other states have been so construed as to hold parties to a strict performance of the conditions on which the validity of the mortgage depends. (*Gassner v. Patterson*, 23 Cal. 301, citing *Chenyworth v. Daily*, 7 Ind. 284; *Divver v. McLaughlin*, 2 Wend. 596, 20 Am. Dec. 655, and note; *Clayborn v. Hill*, 1 Wash. (Va.) 177, 1 Am. Dec. 452; *Meyer v. Gorham*, 5 Cal. 322; *Dufficy v. Shields*, 63 Cal. 332; *Stewart v. Platt*, 101 U. S. 738.) A chattel mortgage, where possession is not given, is void as against mortgagor's creditors if not put on file in the proper office. (*Wallen v. Rossman*, 45 Mich. 333, 7 N. W. 901; *Ward v. Watson*, 24 Neb. 595, 39 N. W. 615.)

A. F. Montandon, for Interveners.

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Interveners had a right to follow the mortgaged goods wherever found, and if plaintiffs converted them to interveners' damage, they should account and the judgment should be affirmed. The insolvency of the Alturas Commercial Company is clearly demonstrated. Plaintiffs are liable for any prejudicial act of theirs to interveners as subsequent mortgagees. (Coffey on Chattel Mortgages, sec. 1046; *Russell v. Lau*, 30 Neb. 805, 47 N. W. 193.) In the light of the facts plaintiffs' mortgage is void in law and in fact as to the Simmons Hardware Company and the Standard Oil Company, defendants in this cause. (*McDonald v. Swisher*, 57 Kan. 205, 45 Pac. 593, 595.)

Action by Wells, Fargo & Co. and others against the Alturas Commercial Company and others. T. S. Merchant & Co. and others intervene. Judgment for defendants, and plaintiffs appeal. Affirmed as to certain defendants, and reversed as to others.

On September 15, 1894, the Alturas Commercial Company, a corporation doing business at Hailey, Alturas county, Idaho, executed a chattel mortgage upon a stock of general merchandise, fixtures, and other chattels in said town of Hailey to the plaintiffs Wells, Fargo & Co. and Fred J. Keisel & Co., the appellants here, to secure a note of that date to Wells, Fargo & Co. of \$6,806.63, and one note of same date to Fred J. Keisel & Co. for \$3,472.65, both notes due thirty days after said date. Said mortgage was recorded in the office of the county recorder in and for Alturas county on the eighteenth day of September, 1894, but was not filed of record in said county recorder's office until the thirty-first day of October, 1894. Said mortgage provided that the mortgagor might remain in possession of the mortgaged property, and sell same in the usual course or manner of trade, as the agent of the mortgagees, applying the proceeds of the sales, less the expense of making them, to the payment of said notes. On October 16, 1894, the Alturas Commercial Company executed another mortgage on the same chattels to the defendants Marshall Field & Co. to secure a note dated October 15, 1894,

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for \$1,761.44, due thirty days after date, and in this mortgage it is recited as follows: "And after a prior lien and chattel mortgage on said stock of goods, made by said first parties on the fifteenth day of September, 1894, to Wells, Fargo & Co. and Fred J. Keisel & Co., has been satisfied, the said first party may sell, and continue to sell, said goods, wares, and merchandise in the usual course and manner of trade as the agent of said second parties, and apply the proceeds of such sales, less the expense of making them, to the payment of said note"—which mortgage was recorded in said county recorder's office October 16, 1894, but not filed of record until November 1, 1894. On October 23, 1894, said Alturas Commercial Company executed a mortgage on the same chattels to the interveners, Henry W. King & Co., Thatcher Milling & Elevator Company, and the Siegel Clothing Company, to secure notes due sixty days after said date for the sums of \$1,058, \$417.66, and \$783, respectively, which mortgage recited that it was subject, "however, to valid prior rights wherever the same may be found." This mortgage provided that the mortgagor might retain said chattels, and "sell said goods, wares, etc., in the usual course of trade, as the agent of said mortgagees, and apply the proceeds thereof in payment of said notes, though neither of them may then be due; mortgagees, and each of them, to pay to mortgagors out of said proceeds, and not otherwise, the necessary expenses of making such sales." This mortgage was filed of record in said county recorder's office October 24, 1894, at 12:25 o'clock P. M. On October 23, 1894, said Alturas Commercial Company executed a mortgage upon said chattels to the intervener, the California Powder Works, a corporation, to secure a note of said date for the sum of \$1,800, due sixty days after date, "subject to prior valid rights, wherever the same may be found," which mortgage provided that the mortgagor might remain in possession, and sell the chattels in the usual course of trade, applying the proceeds, less expenses of sale, on said note, and which mortgage was filed of record in the office of said county recorder October 24, 1894, at 12:20 o'clock P. M. On October 26, 1894, said Alturas Commercial Company executed to the in-

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intervener T. S. Merchant a chattel mortgage on said chattels to secure a note of that date for \$740, "subject to prior valid rights, wherever the same may be found, which mortgage provided that the mortgagor might remain in possession and sell the chattels in the usual course of trade, applying proceeds, less expenses of sale, on said note; and which mortgage was filed of record in said county recorder's office October 26, 1894, at 2:45 o'clock P. M. October 22d and 23d the defendants Simmons Hardware Company, Paxton & Gallagher, Tootle, Wheeler & Motter, and the Standard Oil Company, respectively, obtained attachments in suits brought by them as plaintiffs against the Alturas Commercial Company as defendant, and caused portions of said stock of merchandise to be seized and levied upon by the defendant Jackson, as sheriff of Alturas county. Each of said mortgages provided for reasonable attorney fees in case of foreclosure. The plaintiffs took possession of the mortgaged property which had not been seized under said attachments on the twenty-seventh day of October, 1894, inventoried the same, and sold the same, some at wholesale, and some at retail, paying out of the proceeds the expenses of making the sales. There being a balance unpaid on said mortgage debts to the plaintiffs, they commenced this action against the Alturas Commercial Company, Simmons Hardware Company, Paxton & Gallagher, Tootle, Wheeler & Motter, and A. J. Jackson on the thirty-first day of October, 1894, to foreclose said mortgage. The defendant Alturas Commercial Company did not answer. The defendants Marshall Field & Co. answered, and set up their mortgage, and claimed priority of lien as against the plaintiffs. The other mortgagees' names came into the action as interveners, and by their complaints in intervention set up their respective mortgages, charged waste against plaintiffs, and claimed prior liens to plaintiffs, and demanded an accounting from plaintiffs. The defendants, Paxton & Gallagher, Tootle, Wheeler & Co., and Kuh, Nathan Fisher Company on the trial abandoned the action and the claims to attachment liens on the mortgaged chattels. The court tried the cause without the intervention of a jury, made numerous findings

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of fact, and rendered judgment in favor of defendants and interveners and against plaintiffs, as follows: Dismissing the action as against the defendant Jackson and the attaching creditor defendants, and for recovery by the defendants, Marshall Field & Co. of the sum of \$1,761.44, with interest thereon at the rate of seven per cent per annum from October 15, 1894, and \$175 attorney fees; and to the intervener the California Powder Works in the sum of \$1,800, with interest thereon at the rate of ten per cent per annum from October 24, 1894, and \$175 attorney fees; to the interveners Henry King & Co., Thatcher Milling & Elevator Company, and the Siegel Clothing Company the respective sums of \$1,058, \$417.66, and \$783, with interest to each on said respective amounts at the rate of ten per cent per annum from October 24, 1894, and attorney's fees in the sum of \$175; to the intervener T. S. Merchant the sum of \$740, with interest thereon at the rate of ten per cent per annum from October 26, 1894, and attorney's fees in the sum of \$100. The plaintiffs moved for a new trial, which was denied. The order denying a new trial was lost from the files, but its existence and loss is sufficiently proven by numerous affidavits. The evidence is set forth in full in the record. It was admitted on the trial that the mortgages of the interveners were taken with knowledge of the existence of plaintiffs' mortgage, and with the understanding that their mortgages were subject to the mortgage of the plaintiffs. The trial court held the mortgage of plaintiffs to be fraudulent and void, and charged the plaintiffs with the gross amount of the sales made by the mortgagor while it was in possession, and with the payments made to plaintiffs by the mortgagor, and with the inventory of the goods made at the time that plaintiffs took possession of that portion of the mortgaged property that had not been sold or attached, and with some of the mortgaged chattels which are yet unsold. This appeal is from the order denying a new trial, and from the judgment.

QUARLES, J. (After Stating the Facts.)—It is conceded by the appellants that the judgment, in so far as it dismissed the action against the attaching creditors Simmons Hardware

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Company and Standard Oil Company, and A. J. Jackson, sheriff, was proper. This eliminates from the consideration of this case all questions as to the validity of the mortgages in question as against attaching creditors, and brings us to the question of the rights of the mortgagees as among themselves. No question of purchase without notice arises. It is conclusively shown by the record that the defendants and interveners holding mortgages on the mortgaged chattels in question took their mortgages with actual notice of the existence of the mortgage of plaintiffs, and with the express understanding that their mortgages were subject to the mortgage of the plaintiffs. A mortgagee who takes a mortgage on property which is already mortgaged with actual notice of such mortgage, and agrees that his lien shall be subject to such former mortgage, takes subject to such former mortgage, although the latter may not have been filed of record in the county recorder's office of the county in which the mortgaged property is situated, as required by statute, at the time of the execution and filing of the latter mortgage. It is contended by the junior mortgagees that the mortgage to the plaintiffs is void, for the reason that it was understood between the mortgagor and plaintiffs, at the time the mortgage was given, that the mortgagor should buy new goods out of the proceeds of sales of the mortgaged chattels, and might pay old debts out of same. If this contention was sustained by the evidence, it would result that the mortgage was intended to enable the mortgagor to continue business, and hold its creditors off, thus delaying them. A mortgage given with such intent or for such purpose would be void under our statutes. We have carefully examined the evidence and the entire record, which is very voluminous, and do not think the evidence sufficient to sustain this contention. Neither of the officers or agents of the plaintiffs were present when the mortgage was executed. It was drafted in Utah, by the attorney for the plaintiffs, and sent to the mortgagor, for execution, through the mails. There is some evidence—unsatisfactory, however—showing that agents, not only of plaintiffs, but of the junior mortgagees, knew that some of the proceeds of the sales were being applied to pur-

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chasing new goods to replenish the stock. As to this condition, no complaint appears to have been made by any of the mortgagees, all of whom knew, or had the means of ascertaining, what was being done with the proceeds of the sales of the mortgaged chattels by the mortgagor; and neither of them is in any better position than the others. The junior mortgages are, in substance and effect, the same, as to the terms and conditions, as that of the plaintiff's. This being true, and each of them having been taken with actual notice of plaintiffs' mortgage, and expressly subject thereto, neither of the junior mortgagees are in position to question the validity of the mortgage of plaintiffs. All of them being on the same footing, they must stand or fall together. Conceding that each of the mortgages in question here is void as against attaching creditors or *bona fide* purchasers without notice, yet as between the parties to these mortgages, and as among the different mortgages here, each of the mortgages in question are valid, the priority of one over another depending alone upon the time of the execution and delivery of the mortgages, respectively. The priority in this case, as shown by the record, is as follows: 1. Mortgage of the plaintiffs; 2. That of defendants Marshall Field & Co.; 3. That of California Powder Works; 4. That of Henry King & Co., Thatcher Milling & Elevator Company and Siegel Clothing Company; 5. That of T. S. Merchant. Under the facts of this case, the junior mortgagees, and each of them, are estopped from questioning the validity of the mortgage to the plaintiffs.

The plaintiffs must account in this action for what was paid on their mortgage debt by the mortgagor, and also for the proceeds of sales made by plaintiffs under their mortgage, whether for cash or on credit, from which the actual and reasonable expenses of making such sales shall be deducted. And judgment foreclosing plaintiffs' mortgage must be made and entered, and the proceeds of sale of the mortgaged property, less the expenses of making the sale, either by said private sales or under the judgment of foreclosure, shall be applied on the mortgage debts aforesaid in the priority above named. The judgment is affirmed as to the defendants

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Simmons Hardware Company, Standard Oil Company, and A. J. Jackson, and is reversed as to all of the other parties, and the cause remanded to the district court for further proceedings consistent with the views herein expressed. Inasmuch as the transcript in this case is not made up, arranged, and printed in the manner required by the rules of this court, the same not being arranged in chronological order, and containing the title of the cause a number of times, numerous affidavits of verification, and the stenographic minutes of the court reporter, the cost of procuring and printing said transcript will not be allowed to the appellants, but appellants are allowed all other costs of appeal.

Huston, C. J., concurs.

Sullivan, J., owing to sickness, was unable to sit at the hearing, and took no part in the decision.

ON REHEARING.

(March 3, 1899.)

HUSTON, C. J.—The petition for rehearing presents no question which was not fully considered either on motion to dismiss or on the original hearing. The motion to dismiss was based upon the ground that briefs were not served within the time required by the rules, and that the transcript was not in chronological order, which motion was denied. It is now insisted that the court should, of its own motion, have dismissed the appeal, for the reason that no evidence of service of appeal is contained in the transcript. A complete answer to this contention is that the appellants, on suggestion of diminution of the record, were permitted to bring up a certified copy of the original notice of appeal and proof of service thereof, from which it appears that the notice of appeal was served upon all of the defendants and interveners. We are fully convinced that the decision herein is correct, and, no reason being shown why a rehearing should be granted, the petition therefor is hereby denied.

Quarles, J., concurs.

Sullivan, J., took no part in the decision.

Opinion of the Court—Quarles, J.

(March 18, 1899.)

IN RE FRED MARSHALL.

[56 Pac. 470.]

HABEAS CORPUS—INFORMATION—JURISDICTION.—When the petitioner is imprisoned on a bench warrant issued upon an information irregular upon its face, but which charges a public offense within the jurisdiction of the trial court, the writ of *habeas corpus* does not lie, as such writ cannot be substituted for a writ of error.
(Syllabus by the court.)

An original proceeding in supreme court for writ of *habeas corpus*.

J. L. Niday, for Petitioner.

The county attorney has no authority to file an information except when the defendant has had a preliminary examination as required by law, and has been regularly committed by a magistrate. (Const., art. 1, sec. 8; First Sess. Laws, 186.) The object of requiring a preliminary examination in a criminal case is, primarily, for the benefit of the accused, and to protect him from being restrained of his liberty unless he consents thereto, until the state has made a *prima facie* case against him. This is a right given to everyone accused of crime. (*State v. Lar-kins*, 5 Idaho, 200, 47 Pac. 945.)

S. H. Hays, Attorney General, for the State.

No brief filed.

QUARLES, J.—The defendant applies for a writ of *habeas corpus*. The petition alleges, as ground for the writ, the following, to wit: 1. That the act approved March 6, 1893, which amends the information act of 1891, was not passed in the manner required by the constitution, and is void; 2. That the information was not verified by the oath of the county attorney who filed it, or by any one else.

The facts alleged in the petition show that the petitioner was arrested about December 6, 1898, under a complaint charging him with grand larceny committed in Ada county, and was on

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the twelfth day of December, 1898, examined before C. C. Siggins, a justice of the peace in and for West Boise precinct, in said county, and committed by said magistrate to answer to the district court, and his bail fixed at the sum of \$200, which he gave; that on January 30, 1899, Edward J. Frawley, county attorney for said Ada county filed an information in the district court in and for said county, charging said petitioner with the same offense for which he had been committed, whereupon a bench warrant was issued against the petitioner, under which he was arrested and under which he was, and still is, confined by J. P. Campbell, sheriff of said Ada county; that said information was not sworn to by said county attorney, or sworn to at all, for which reason the said district court did not acquire jurisdiction of the person of the petitioner; that on March 4, 1899, petitioner made application to the Honorable George H. Stewart, district judge, upon a petition setting forth the facts disclosed in his petition herein, for a writ of *habeas corpus*, which writ was denied him by said district judge; that he is still imprisoned illegally under said bench warrant issued upon said information. The petition is inconsistent, in this: It alleges in one place that the petitioner had a preliminary examination before the committing magistrate, who held him "on the charge set forth in said complaint, as shown by the depositions taken on said examination heretofore referred to, and made a part hereof," while in another place it avers "that the said Fred Marshall has never had a preliminary examination on the offense charged in the information, and has not been committed by a magistrate on the alleged offense set forth in said information, that he has never waived such preliminary examination on the same, and that he is not a fugitive from justice." Attached to the petition, as exhibits, are copies of the complaint filed before the committing magistrate, copy of the order of commitment, copy of the information, and a copy of the journal entries, showing the manner in which the act of March 6, 1893, was passed; but the depositions, nor copies thereof, taken before the committing magistrate, are not in the record before us.

It is a well-settled rule of law that irregularities in an indictment or information are not open to review on application

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for writ of *habeas corpus*. Conceding the facts to be as stated in the petition the writ must be denied; for it appears that the district court had jurisdiction both of the offense, and of the person of the petitioner. If the act of March 6, 1893, is void, the act of March 13, 1891, is valid; and the only change attempted in it by the act of March 6, 1893, is to repeal that part of section 3 (Act March 13, 1891) relating to the verification of the information. Now, if it be necessary to verify the information, the failure to do so is an irregularity only, and one which cannot be reviewed in this proceeding, but may be cured in the trial court below, or reviewed by the trial court on motion for new trial, or by this court on appeal. It is unnecessary to decide whether said act of March 6, 1893, was constitutionally passed or not, as, whether it be held valid or not, the application of the petitioner must be denied for the reasons above given. It being unnecessary to decide upon the validity of the act of March 6, 1893, former decisions of this court preclude us from doing so. (*Commissioners v. Mayhew*, 5 Idaho, 572, 51 Pac. 411; *State v. Ridenbaugh*, 5 Idaho, 710, 51 Pac. 750; *State v. Baker*, ante, p. 496, 56 Pac. 81.) If the defendant had no preliminary examination, and did not waive same, he should present that question to the trial court when called on to plead or be held to have waived it. (*State v. Clark*, 4 Idaho, 7, 35 Pac. 710; *State v. Larkins*, 5 Idaho, 200, 47 Pac. 945.) "Neither a departure from the form or mode prescribed by this code [Penal Code] in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice in respect to a substantial right." (Idaho Rev. Stats., secs. 7687, 8236; *Territory v. Anderson*, 2 Idaho, 573, 21 Pac. 417; *Bonney v. State*, 3 Idaho, 288, 29 Pac. 185.) The irregularity complained of, if it be an irregularity, can be taken advantage of by the defendant by motion to set aside the information. (See Rev. Stats., sec. 7730; Act March 13, 1891, sec. 4; *Stats. Laws 1890-91*, p. 185.) The objection is waived, if not made by motion. (Rev. Stats., sec. 7731.)

The object of this proceeding on the part of the petitioner is to review and take advantage of alleged irregularities in a

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criminal case pending against him in a court of competent jurisdiction. The showing made in the petition is not sufficient, under our code, to authorize the discharge of the petitioner. It - appearing that the writ demanded ought not to issue, under the provisions of Revised Statutes, section 8343, the same is hereby denied.

Huston, C. J., and Sullivan, J., concur.

(May 2, 1899.)

BARNES v. BUFFALO PITTS COMPANY.

[57 Pac. 267.]

APPEAL—UNDERTAKING ON APPEAL—FORECLOSURE OF MORTGAGE—STAY OF EXECUTION.—On appeal from a judgment for foreclosure of a mortgage upon personal property, an undertaking in the sum of \$300 is sufficient to stay the execution of the judgment pending the appeal, and if the district court requires the appellant to give a further undertaking to stay execution, such undertaking is void and cannot be enforced against the sureties therein.

(Syllabus by the court.)

APPEAL from District Court, Latah County.

George W. Goode and Warren Truitt, for Appellant.

Appellant claims that when an appeal is perfected from such an order or judgment as the one appealed from, all proceedings in the cause are stayed until the determination of such appeal. (Idaho Rev. Stats., sec. 4814; *Ruggles v. Superior Court*, 103 Cal. 125, 37 Pac. 211; *Livermore v. Campbell*, 52 Cal. 75; *Chouteau v. Rowse*, 90 Mo. 191, 2 S. W. 209; *Petrie v. Muskegon C. Judge*, 98 Mich. 130, 56 N. W. 1109; *Woodrum v. Kirkpatrick*, 2 Swan (Tenn.), 218; 2 Ency. of Pl. & Pr. 327 et seq.; *Kaufman v. Superior Court*, 108 Cal. 446, 41 Pac. 476.)

S. S. Denning, for Respondent, cites no authorities on this point decided by the court.

Opinion of the Court—Huston, C. J.

HUSTON, C. J.—Plaintiff brought action against defendant under the provisions of section 3364 of the Revised Statutes to recover \$100 penalty, and \$300 damages, for defendant's refusal to discharge a mortgage alleged to have been fully satisfied. The answer put in issue the material allegations of the complaint, and at the same time defendant filed a cross-complaint, alleging the sum of \$402.15 and an attorney's fee of \$40 to be due on the promissory notes secured by said mortgage, and demanding judgment and decree foreclosing said mortgage. Judgment and decree for the amount claimed by defendant in its cross-complaint was rendered by the district court, from which plaintiff appealed to this court, where the judgment of the district court was affirmed. (*Barnes v. Agricultural Works*, ante, p. 259, 55 Pac. 237.)

Upon taking appeal from the judgment and decree of the district court, in favor of the defendant, the plaintiff in said action filed his undertaking on appeal in the sum of \$300, and subsequently, by order of the court, filed an additional bond in the sum of \$150, as fixed by the court, "to pay any deficiency arising from the sale of said property, and under said statutory obligations." Subsequently the judge of the district court set aside its order so made as "erroneous and void," and required the appellant in that action to give a bond in double the amount of the judgment and decree; which order was complied with by the plaintiff in said action by filing a new undertaking for costs in the sum of \$300, and a stay bond in the sum of \$950, that being the amount fixed by the judge of the district court, and the sum being more than double the amount of the judgment or decree rendered in said cause, which was \$450.85. On the coming down of the *remittitur*, the appellant in said action moved for judgment on the undertaking on appeal against the sureties therein, under the provisions of section 4810 of the Revised Statutes. The plaintiff filed objections to said motion, which objections were sustained by the court, and the motion overruled, from which action of the district court this appeal is taken.

The only matter before us for review on this appeal is the action of the district court in overruling defendant's motion for

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judgment against the sureties on the undertaking on appeal. It is contended by appellant—first, that the undertaking in question was authorized by sections 4810 and 4813 of the Revised Statutes; second, that if the undertaking “was not authorized by statute, still the judge had jurisdiction of the subject matter, and, if his judgment or order was erroneous, it ought to have stood upon its exceptions, and taken an appeal to this court from such order or objection”; third, “conceding that the bond was not authorized either under section 4810 or section 4813, still the court was authorized to order and demand the bond under sections 4 and 3925 of the Code of Idaho.” The fourth contention, we think, is altogether too speculative to require consideration.

As to the first proposition of appellant: Section 4810 of the Revised Statutes provides for and defines the kind of undertaking required in an appeal from a money judgment. This was not an appeal from a money judgment. The action was for the foreclosure of a chattel mortgage. The judgment and decree was for a foreclosure and sale of the mortgaged property. There can be no money judgment entered in an action to foreclose a mortgage lien, except as provided in section 4520 of the Revised Statutes, to wit: “And if it appear from the sheriff’s return that the proceeds are insufficient and a balance still remains due, judgment can then be docketed for such balance, against the defendant or defendants personally liable for the debt, and it becomes a lien on the real estate of such judgment debtor, as in other cases on which execution may be issued.” The statement in the decree, “that the defendant, the Buffalo Pitts Company, do have and recover from plaintiff, Thomas Barnes, the sum of \$142.15, with interest thereon at the rate of seven per cent per annum from date hereof, together with costs of suit, hereby taxed at \$8.70,” is not a money judgment. No execution could be issued thereon; but when the mortgaged property has been exhausted, and there still remains a balance due the creditors, he may have a judgment docketed “for such balance against the defendant or defendants personally liable for the debt,” etc. It seems to us the purpose of the statute is plain, and its provisions clear and unequivocal.

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Section 4520 of the Revised Statutes provides: "There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate or personal property which must be in accordance with the provisions of this chapter." This would seem to settle the contention of appellant that the judgment in this case was a money judgment, and came under the provisions of section 4810 of the Revised Statutes in regard to undertakings on money judgments. Section 4813 of the Revised Statutes applies solely to appeals from judgments or orders directing the sale or delivery of possession of real property, and has no application to the case under consideration.

But appellant contends that, although the undertaking was not authorized either under sections 4810 and 4813 of the Revised Statutes, "still the court was authorized to order and demand the bond under sections 4 and 3925 of the Code of Idaho." The benevolence of section 4 of the Revised Statutes, latitudinous as it is, can hardly be invoked in this case. Section 3925 is as follows: "When jurisdiction is by this code or any other statute conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of the jurisdiction if the course of proceedings be not specially pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code." But the code has clearly and succinctly pointed out the procedure to be followed in cases such as that under consideration, in sections 4809 and 4817 of the Revised Statutes. The statute having provided the kind of an undertaking required, the court was not authorized or empowered to demand another or different undertaking, and its order to that effect was void. (*Snow v. Holmes*, 64 Cal. 232, 30 Pac. 806; *Powers v. Crane*, 67 Cal. 65, 7 Pac. 135; *Johnson v. Powers*, 93 Cal. 266, 28 Pac. 1070.) The judgment of the district court is affirmed, with costs to respondent.

Quarles and Sullivan, JJ., concur.

Argument for Appellant.

(May 2, 1899.)

MILLER v. HUNT.

[57 Pac. 315.]

APPEAL—ORDER SUSTAINING DEMURRER—COUNTERCLAIM.—An order sustaining a demurrer to a counterclaim set forth in an answer may be reviewed on an appeal taken from the final judgment in the action by the defendant.

FORECLOSURE—COUNTERCLAIM SET FORTH IN ANSWER.—In an action by the mortgagee to foreclose his mortgage, the mortgagor may, in his answer, set forth a counterclaim for purchase money due him from the mortgagee on bargain and sale of realty, and it is reversible error to sustain a demurrer to such counterclaim on the ground that there is "no relation or connection between the subject matter set out in plaintiff's complaint and the said counterclaim."

INSURANCE PREMIUMS.—Insurance premiums voluntarily paid by the mortgagee, who insures the mortgaged property, cannot be recovered by him in the absence of a provision in the mortgage authorizing him to insure the mortgaged property at the expense of the mortgagor.

(Syllabus by the court.)

APPEAL from District Court, Idaho County.

James De Haven, for Appellant.

The counterclaim arose out of the same transaction set forth in the plaintiff's complaint. It is a cause arising on contract and existed at the commencement of the action. It is also a cause of action in favor of defendant, William Hunt, and against the plaintiff. The court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others. (Rev. Stats., sec. 4113; *First Nat. Bank of Hailey v. Bews*, 3 Idaho, 486, 31 Pac. 816.) In an action to foreclose a mortgage, in a court of equity, the mortgagor is entitled to set off a debt due him from the complainant, in any case where a setoff would be allowed in an action at law. (*Richmond v. Lattin*, 64 Cal. 273, 30 Pac. 818; *Hunt v. Chapman*, 51 N. Y. 555; *Wiltsie on Mortgage Foreclosure*, sec. 376; *Jones on Mortgages*, sec. 1496; *Pingrey on Mortgages*, sec. 1766.) In the absence of a clause in the mort-

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gage expressly providing therefor, insurance premiums paid by the mortgagee for policies insuring the premises cannot be included in the decree of foreclosure. (Ency. of Pl. & Pr. 432, and authorities cited; *Iowa Homestead Co. v. Des Moines etc. R. R. Co.*, 17 Wall. (U. S.) 153.)

J. F. Ailshie and R. E. McFarland, for Respondent.

The note and mortgage pleaded are a joint and not a joint and several obligation, and not subject to a counterclaim in favor of appellant alone. (*Roberts v. Donovan*, 70 Cal. 108, 9 Pac. 180, affirmed in 11 Pac. 599; *McGuire v. Lamb*, 2 Idaho, 378, 17 Pac. 749; *Goldstein v. Kraus*, 2 Idaho, 294, 13 Pac. 232; *Swanholm v. Reeser*, 3 Idaho, 476, 31 Pac. 804.)

QUARLES, J. (After Stating the Facts.)—There is nothing in the motion to dismiss the appeal requiring extended consideration. The principal ground of the motion is that the order sustaining plaintiff's demurrer to the counterclaim set forth in the answer of the defendant cannot be reviewed on appeal from the final judgment by the defendant. This ground is not tenable. Such order may be reviewed on appeal, and, if the order sustaining such demurrer is erroneous, the judgment must be reversed, where the defendant stands on his pleading, and appeals from the final judgment.

Only two questions arise on the appeal upon its merits. The mortgagee, without any stipulation in the mortgage authorizing him so to do, insured the mortgaged premises; and the court awarded him, in its decree, the amount of premium (twenty dollars) paid by him for the policy of insurance. This was error. The payment of the premium by the mortgagee was voluntary, and he was not entitled to recover it back from the defendants.

The second and remaining question arises from the action of the trial court in sustaining the demurrer of the plaintiff to that part of the defendants' answer setting forth a counterclaim. The defendant, by way of counterclaim, averred that on August 31, 1896, he (the defendant, William Hunt,) and his wife, the defendant, Martha E. Hunt, bargained, sold, and

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conveyed to the plaintiff a tract of land situated in the state of Kansas, for which the said plaintiff agreed to pay to the defendants the sum of \$600 on or before December 25, 1896; that said plaintiff had paid to the defendants thereon the sum of \$295.95, and no more, leaving due thereon since December 25, 1896, the sum of \$304.05, which defendants sought to offset against the mortgage debts of plaintiff. The trial court apparently sustained the demurrer on the ground that "no relation or connection between the subject matter set out in plaintiff's complaint and the said counterclaim" existed. The ruling of the court was error. It was not necessary that the counterclaim should grow out of, or be connected with, the cause of action. The action sued on arose upon contract. The counterclaim set forth in the answer also arose upon contract, existed at the commencement of the action, and could properly be pleaded under the provision of subsection 2 of section 4184 of the Revised Statutes. But it is contended by the respondent that, inasmuch as the mortgages and notes upon which the action is founded were executed by the defendant, William Hunt, and his wife, Martha E. Hunt, their liability is joint, and for that reason the said counterclaim, which ran to the husband alone, cannot be properly pleaded in this action. This contention is not well founded. There is no allegation in the complaint showing that the mortgage debts were created for the benefit of the separate estate of the wife. This being true, the presumption is that such debts were community debts, for which the husband alone is personally liable. The plaintiff and the court below acted on this presumption, as the decree provides for entering a deficiency judgment against the husband alone. The demurrer to his counterclaim should have been overruled, and the defendant permitted to prove his counterclaim. The plaintiff should have had judgment foreclosing his mortgages for the amount due thereon, less whatever may be due from him, with legal interest from maturity, on the bargain and sale contract set forth in defendant's counterclaim. Plaintiff should also recover a reasonable attorney fee in his first cause of action, and twenty-five dollars attorney fee in the last cause of action, in accordance with the stipulations

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in the two mortgages. The judgment is reversed, and the cause remanded for further proceedings in accord with the views herein expressed. Costs of appeal awarded to the appellants.

Huston, C. J., and Sullivan, J., concur.

(May 4, 1899.)

SECURITY SAVINGS AND TRUST COMPANY v.
ROGERS.

[57 Pac. 316.]

INSOLVENCY LAW—JURISDICTION.—The insolvency laws of Idaho have no extra territorial operation, and the promissory notes of a resident owned by a nonresident are not barred by the discharge of such resident in an insolvency proceeding, unless such nonresident voluntarily becomes a party to such proceedings, and thus submits himself to the jurisdiction of the laws of the state where such insolvency proceedings are had.

COLLATERAL SECURITY.—Promissory notes held as collateral security, duly assigned to a nonresident, before maturity and for a valid consideration, are not barred by the discharge in insolvency of the maker of such notes, if the holder thereof has not voluntarily submitted himself to the jurisdiction of the laws of the state where such discharge was granted.

(Syllabus by the court.)

APPEAL from District Court, Latah County.

Orland & Smith and Winfree, for Appellant.

These were negotiable notes, and being indorsed and delivered to the plaintiff before their maturity, for a valuable consideration, the debt was at the time of the filing of the petition of insolvency held and owned by a nonresident of the state of Idaho, and the insolvency laws of Idaho could have no extra-territorial effect, and were, and are, no bar to this debt; and the fact that they were held as collateral security does not change this rule. (*Baldwin v. Hale*, 1 Wall. 223.) Insolvent laws of one state cannot discharge the contracts of citizens

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of other states, because they have no extraterritorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other state voluntarily becomes a party to the proceeding, has no jurisdiction in the case. Legal notice cannot be given, and consequently there can be no obligation to appear, and of course there can be no legal default. Placing the matter of discharge as to nonresidents clearly upon citizenship at the time of the filing of the petition or the granting of the discharge. (*Carbee v. Mason*, 64 N. H. 10, 4 Atl. 791, 792; *Roberts v. Atherton*, 60 Vt. 563, 6 Am. St. Rep. 133, 15 Atl. 159, 160; *Hawley v. Hunt*, 27 Iowa, 303, 1 Am. Rep. 273.) It is held that, where collateral security is simply delivered and not indorsed, the legal title still rests in the pledgor, and the pledgee has only the equitable interest. (*Smalley v. Wright*, 44 Me. 442, 69 Am. Dec. 112; *Gibson v. Minet*, 1 H. Black. 605; *Thomas v. Crow*, 65 Cal. 470, 4 Pac. 448; *Bank of Chadron v. Anderson*, 6 Wyo. 518, 48 Pac. 197-201; *Wade v. Sewell*, 56 Fed. 129; *French v. Robinson*, 86 Me. 142, 41 Am. St. Rep. 533, 29 Atl. 960; *Newton v. Hagerman*, 22 Fed. 525, and cases cited; *Andrews v. McCoy*, 8 Ala. 920, 42 Am. Dec. 669; *Muller v. Pondir*, 55 N. Y. 325, 14 Am. Rep. 259, 262; *Lamberton v. Windom*, 12 Minn. 232, 90 Am. Dec. 301, 307; *Lancaster Nat. Bank v. Taylor*, 100 Mass. 18, 97 Am. Dec. 70; *Clark v. Whitaker*, 50 N. H. 474, 9 Am. Rep. 286; *Haskell v. Mitchell*, 53 Me. 468, 89 Am. Dec. 711; *Hatcher v. Independence Nat. Bank*, 79 Ga. 547, 5 S. E. 111; *Gaston v. Griffith* (Tenn.), 3 S. W. 642; *Fox v. Harrison Nat. Bank*, 6 Kan. App. 682, 50 Pac. 458.) An insolvency proceeding is a personal action, and citizenship governs the parties to the action, and citizenship over the holder of the legal title. If, then, the insolvency proceedings is a personal action, is it not necessary that the debt be mentioned in the schedule, and that such debt be so mentioned as to give notice to the holder of the debt? (*Russell v. Rogers*, 9 Mart. 588, 13 Am. Dec. 326.)

No appearance for respondents.

Opinion of the Court—Sullivan, J.

SULLIVAN, J.—This suit was brought to recover on two certain promissory notes, alleged to have been executed by the defendants, H. M. Rogers and Paulina Rogers, his wife. The defendant, H. M. Rogers, answered the complaint, admitted his execution of said notes, but defended on the ground that he had obtained a discharge in insolvency under the insolvent laws of the state of Idaho. The defendant, Paulina Rogers, answered, and denied that she had signed either of said promissory notes. The plaintiff dismissed the action as to her. The cause was tried by the court with a jury. Verdict was given in favor of the defendant, and judgment entered dismissing the action. A motion for a new trial was made by the plaintiff, who is the appellant here, and overruled by the court. The appeal is from the judgment and the order denying the new trial. Numerous errors are assigned, but the main question for determination is whether the discharge of the defendant, Rogers, as an insolvent, under the insolvency laws of Idaho barred recovery on said promissory notes. The facts in regard to the execution of said notes and the transfer of them to the appellant corporation are substantially as follows, as shown by the record: The defendant, H. M. Rogers, executed said notes in favor of the Farmers' Bank of Moscow, Idaho, on the eighth day of November, 1894, due in six months from date. The said bank was largely indebted to the appellant corporation. Prior to the thirty-first day of December, 1894, and before said promissory notes became due, said Farmers' Bank duly assigned said notes to the appellant as collateral security for said indebtedness. It also appears that appellant is a foreign corporation, with its principal place of business at Portland, in the state of Oregon; that said promissory notes remained in the possession of the appellant from the date of said assignment until the trial of this suit. The appellant's claim to said notes finally ripened into full ownership. The defendant's petition praying to be declared an insolvent and to be discharged from his debts was made on the first day of October, 1895, and his discharge granted on the twelfth day of February, 1896. The appellant corporation did not appear in said insolvency proceedings and file said promissory notes

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as claims against said insolvent's estate, and did not appear therein for any purpose whatever. It did not submit itself to the jurisdiction of the court in which said insolvency proceedings were had, and was not a resident of this state.

The insolvency laws of a state have no extraterritorial operation, and cannot operate on nonresidents, unless they submit themselves to the jurisdiction of such laws. Insolvency proceedings are judicial investigations, and parties whose rights are affected must have their day in court, and, in order to have that, they must be legally notified or voluntarily appear. The courts of one state have no authority to require a citizen of another state to become a party to an insolvency proceeding; and, unless such citizen voluntarily becomes a party to such proceedings, his rights can in no wise be affected thereby.

In *Baldwin v. Hale*, 1 Wall. 223, the court says: "Insolvency laws of one state cannot discharge the contracts of citizens of other states because they have no extraterritorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other state voluntarily becomes a party to the proceeding, has no jurisdiction in the case. Legal notice cannot be given, and consequently there can be no obligation to appear, and, of course, there can be no legal default." In *Carbes v. Mason*, 64 N. H. 10, 4 Atl. 791, the court said: "The insolvent law of one state has no effect in any other, as against a citizen of the latter state holding a claim that follows the person of the creditor, no matter where the debt was contracted, or when it was made payable, unless the citizen of such other state voluntarily proves it in the state where the law was enacted, and thus places himself under its jurisdiction." (See, also, *Roberts v. Atherton*, 60 Vt. 563, 6 Am. St. Rep. 133, 15 Atl. 159; *Hawley v. Hunt*, 27 Iowa, 303, 1 Am. Rep. 273.)

It is contended that the rule laid down in the above-cited cases is not applicable, for the reason that the appellant held said promissory notes, as collateral security at the time of filing said petition in insolvency. In *Colebrook on Collateral Securities*, section 16, it is said: "The pledgee of negotiable in-

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struments, as bills of exchange and promissory notes, before maturity, by indorsement and delivery, so that he becomes a party thereto for a present advance, and as a part of the transaction of loan, and without notice of antecedent equities, is a holder, for value, in due course of business." Said promissory notes were negotiable, pledged before maturity, transferred by indorsement and delivery for a present advance, and as a part of the transaction of loan, and come fully within the rule above stated. The above rule is sustained by ample authority. (See cases cited in *Sims v. Lyles*, 1 Hill, (86), 39, 26 Am. Dec. 156. Also, see *Fox v. Bank*, 6 Kan. App. 682, 50 Pac. 458, as touching the ownership of collateral security.)

The evidence clearly shows that appellant held said notes as collateral security prior to their maturity, and there was no evidence on which to base certain instructions given to the jury to the effect that, if they found the title to said notes did not pass to or vest in the plaintiff until the month of August, 1896, they should find a verdict for the defendant. As there was no conflict in the evidence as to the date the appellant received said notes as collateral security, the giving of said instructions was error, as the evidence clearly showed that appellant received them before the defendant received his discharge. There was much irrelevant and immaterial evidence admitted by the court over the objection of the appellant, but we do not deem it necessary to notice each objection in that regard. The only defense set up by the answer is that the discharge of the defendant in said insolvency proceedings barred recovery on said notes. The defendant admitted the execution of the notes, and all evidence, except that showing, or tending to show, that said discharge barred said notes, was immaterial; and, if this case is retried, all evidence in regard to other papers being signed at the time the notes were signed, and testimony as to the consideration for the notes and the failure of the Farmers' Bank of Moscow, should be excluded. The judgment is reversed, and the cause remanded for further proceedings in accordance with the views expressed in this opinion. Costs are awarded to the appellant.

Huston, C. J., and Quarles, J., concur.

Argument for Respondent.

(May 5, 1899.)

BARGHOORN v. MOORE.

[57 Pac. 265.]

CONTRACT—PAROL EVIDENCE CONTRADICTING RECEIPT.—In a suit growing out of a contract of settlement which is not reduced to writing, the contract itself may be proven, although the evidence proving it contradicts recitals in a receipt connected with the transaction.

(Syllabus by the court.)

APPEAL from District Court, Latah County.

C. J. Orland, for Appellant.

Idaho Code. section 3465, provides how negotiable instruments may be transferred; those made payable to a person named or his order are payable to the written order of the payee; there can be but one construction of this section of the code. relative to the transfer of negotiable paper in Idaho, and that is, that the title does not pass to such paper made to order, except upon the written order of the payee. (*Smalley v. Wight*, 44 Me. 442, 69 Am. Dec. 112; *Lancaster v. Baltzell*, 7 Gill & J. 468, 28 Am. Dec. 233; *Foltier v. Schroeder*, 19 La. Ann. 17, 92 Am. Dec. 521; *Kohn v. Watkins*, 26 Tex. 691, 40 Am. Rep. 336; *Durein v. Maeser*, 36 Kan. 441, 13 Pac. 797; *Hedges v. Seely*, 9 Barb. 215; *Bilderback v. McConnell*, 48 Mich. 345, 12 N. W. 195; *Spinning v. Sullivan*, 48 Mich. 5, 11 N. W. 758; *Asgood v. Art*, 17 Fed. 575.) The contract with reference to this entire transaction is all in writing, and being all one transaction occurring at the same time, should all be construed as one instrument and as constituting the contract. (*Treadwill v. Archer*, 76 N. Y. 197; *Knowes v. Toone*, 96 N. Y. 534; *American G. & V. Co. v. Wood*, 90 Me. 516, 38 Atl. 548; *Keith v. Miller*, 174 Ill. 64, 51 N. E. 151.)

Forney, Smith & Moore, for Respondent.

The rule that excludes parol evidence in contradiction of a written agreement has no application if the writing was not delivered as a present contract, and the effect of the delivery

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and the extent of the operation of the instrument, such as a promissory note, may be limited as between the original parties thereto by the conditions with which delivery is made. (*Burke v. Dulaney*, 153 U. S. 228, 14 Sup. Ct. Rep. 816; *Corlies v. Howe*, 11 Gray, 125, 71 Am. Dec. 693; *Benton v. Martin*, 52 N. Y. 570; *Pennsylvania Ins. Co. v. Crane*, 134 Mass. 56, 45 Am. Rep. 282; *Westeman v. Krumweide*, 30 Minn. 313, 15 N. W. 255; *Juilliard v. Chaffee*, 92 N. Y. 529.) Plaintiff's exhibit "E" is a receipt, and may be varied, explained or contradicted by parol. (*Morse v. Rice*, 36 Neb. 212, 54 N. W. 308; *Groesbeck v. Marshall*, 44 S. C. 538, 22 S. E. 743; *Allen v. Tacoma Mill Co.*, 18 Wash. 216, 51 Pac. 372; *Corlies v. Howe*, 11 Gray, 125, 71 Am. Dec. 693; *White v. Merrill*, 32 Ill. 511; *Galveston H. & A. Ry. Co. v. House*, 4 Tex. Civ. App. 263, 23 S. W. 232; *Bloomington v. Durrell & Co.*, 1 Idaho, 33; *Smith v. Caldwell*, ante, p. 436, 55 Pac. 1065.) In the case of *Allen v. Tacoma Mill Co.*, 18 Wash. 216, 51 Pac. 372, the defendant offered in evidence an instrument in the following words and form: "Received from T. M. Co. \$988, being in full settlement of all claims and demands for all logs contained in rafts received and scaled by said company November 19th, and we hereby accept the scale of T. M. Co. on said logs, which is 227,128 feet. Hoods Canal Lumber Co., by A. J., Pres." When the evidence was all in, counsel for defendant below and appellant above asked for a peremptory instruction to the jury to return a verdict for the defendant on the ground that the instrument was a contract and could not be varied by parol. This was refused by the trial court; plaintiff had judgment and defendant appealed. The supreme court of Washington held that the instrument was nothing more nor less than a receipt and could be explained by parol evidence. Judgment was affirmed.

QUARLES, J.—Plaintiff sued upon a promissory note executed to the Moscow National Bank of Moscow by defendant, for \$1,500. The answer specifically denies the allegations of the complaint, and, as a second defense, avers that in November, 1893, H. K. Moore, a son of the defendant, was indebted to the Moscow National Bank of Moscow in the sum of \$9,048.50, secured by pledge of certain notes payable to said H. K. Moore,

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and secured by trust deed to certain real estate in Moscow, Latah county; that at said time defendant was the owner of a certain promissory note executed by the Idaho Builders' Supply Company (a corporation), H. R. Smith, C. H. Henderson, T. J. Taylor, C. A. Cochran, W. A. Lauder, and William Lauder, as original makers, payable to the order of the defendant, for the sum of \$1,500, payable August 25, 1893, with interest from that date at the rate of one and one-quarter per cent per month until paid, secured by mortgage upon real estate in Moscow, Latah county; that, after the execution of said mortgage to defendant, M. J. Field's Company (a corporation) purchased said mortgaged premises; that in November, 1893, the said Moscow National Bank, through R. S. Browne, its president, entered into an agreement with the defendant whereby said indebtedness of H. K. Moore to it was canceled, in consideration of the pledged notes due to said H. K. Moore from different parties, aggregating \$4,497, the note of defendant then executed to said bank for \$3,000, due one year after date, and the note executed to defendant by the Idaho Builders' Supply Company and others (except the interest that had accrued thereon), and the said bank conveyed to defendant the real property held by it in trust as aforesaid; that at that time the president of said bank falsely and fraudulently, and with intent to deceive and defraud the defendant, represented to defendant that, by the regulations pertaining to national banks, said bank would not be able to carry said Idaho Builders' Supply Company's note among its bills receivable, for the reason that said note was past due, and then requested defendant to execute the note sued on, for the purpose that it might appear among the bills receivable of said bank, to its credit, in lieu of and in place of said note of the Idaho Builders' Supply Company transferred to said bank by the defendant, and for no other purpose; that she relied upon said representations, and believed them to be true, and executed the note sued on, that it might appear among the assets of said bank in lieu of said Idaho Builders' Supply Company, and for no other purpose; that said bank caused the mortgage securing said Idaho Builders' Supply Company's note to be foreclosed by action in the name of the de-

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fendant, the mortgaged property to be sold under foreclosure proceedings, and bid in, in the name of the defendant, without her knowledge or consent, for the purpose of defrauding and cheating the defendant; that the defendant claims no interest in said premises by reason of said sale, or in the judgment and decree in said action, or in any deficiency judgment entered therein, and that she is, and at all times has been, ready and willing to assign and transfer said mortgaged property, and the decree and deficiency judgment in said action, to said bank, or to any other person whom the court may judge to be entitled thereto, and she is now ready and willing to so convey said premises and assign said judgment to whom the court may direct, and that she has no knowledge, or information sufficient to form a belief, as to who is the owner of said premises and judgment, or who is entitled to a conveyance thereof; that the plaintiff, at the time the note sued on was assigned to him, well knew all of said facts, and well knew that said note was executed by the defendant to said bank for accommodation, without consideration, and under the circumstances aforesaid. The cause was tried before the court and a jury, and a verdict rendered in favor of the defendant, which was duly received and recorded, and upon which judgment was duly entered in favor of the defendant. The plaintiff moved for a new trial, which was denied him, and he appeals both from the judgment and the order denying a new trial. The evidence is contained in plaintiff's bill of exceptions.

A careful consideration of the evidence convinces us that the verdict of the jury is supported by the evidence, and that the allegations of the answers are proven. The errors, as assigned by appellant, and upon which a reversal is sought, relate to rulings of the court in admitting evidence. It appears that the negotiations relating to the settlement of the H. K. Moore indebtedness to the bank extended through a period of several days; that at the time it was closed, and the notes of defendant delivered, Browne, the president of the bank, was hurrying to leave Moscow for Portland, and that the matter was hurriedly closed; that the bank, through its president, gave the defendant the following receipt, to wit:

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“Moscow, Idaho, Nov. 29, 1893.

“Rec’d from Mrs. Julia A. Moore note signed by Idaho Builders’ Supply Comp’y, dated Aug. 25, ’92, due one year, for \$1,500, at 1¼ per cent. Said note left as collateral security to Julia A. Moore note, dated Nov. 8, ’93, due Jan. 1st, 1895. Said note and mortgage to be foreclosed against said I. B. S. Co., and proceeds applied on said note of Julia A. Moore as fast as so collected. Said foreclosure to take place in next term of court (spring term).

(Signed) “R. S. Brown, Pt.”

Appellant contends that the court erred in permitting the defendant to prove, by oral evidence, the contract, on the ground that such evidence contradicted a written instrument. We think the evidence was proper. The contract between the parties was not reduced to writing. It was oral. In performing the contract, defendant transferred the Idaho Builders’ Supply Company note to the bank, and gave the bank her note for \$3,000, which she afterward paid. She also, to accommodate the bank, without consideration, gave the bank the note sued on in this case, under promise from the president of the bank that it would not be collected, but used solely in making a showing of assets under the United States banking laws. The receipt quoted above was a memorandum signed by only one of the parties, and misrepresented some of the facts relating to the transaction between the parties. Such receipt did not preclude the parties from showing the contract made by them. Plaintiff took the note sued on from the payee with full knowledge of all the facts, after maturity, and stands in the same position as the payee would, if the payee was plaintiff. The evidence objected to was properly admitted. We find none of the assignments of error well founded, wherefore the judgment and order appealed from are affirmed. Costs of appeal awarded to the respondent.

Huston, C. J., and Sullivan, J., concur.

Argument for Appellant.

(May 8, 1899.)

COOMBS v. COLLINS.

[57 Pac. 310.]

PROBATE COURT — EXECUTION — SERVICE BY CONSTABLE.—In certain cases a constable may execute and return an execution issued out of a probate court and may justify under it, if it is valid on its face. Under the provisions of section 3021 of the Revised Statutes, the transfer of the personal property described in the complaint was void as against the creditors of the seller thereof. Under the facts of the case no demand was necessary before beginning this action.

(Syllabus by the court.)

APPEAL from District Court, Latah County.

Clay McNamee and Forney, Smith & Moore, for Appellant.

The complaint shows an attempted sale of personal property without a change of possession, and is, therefore, absolutely fraudulent and void. (Idaho Rev. Stats., sec. 3021; *Harkness v. Smith*, 5 Idaho, 321, 28 Pac. 423, construing said section; *Lawrence v. Burnham*, 4 Nev. 361, 97 Am. Dec. 540; *Hallett v. Parrish*, 5 Idaho, 496, 51 Pac. 109.) Whatever may be the general rule, it is well settled that in such a case as this a demand is absolutely necessary to the maintenance of plaintiff's cause. (*Dunn v. Choate*, 4 Tex. 14 (19); *Calvit v. Cloud*, 14 Tex. 53.) Even if this case be treated as a conversion, demand under the circumstances set out in the complaint is necessary. (*Pitlock v. Wells-Fargo Co.*, 109 Mass. 452 (456-457; *Mulhisen v. Lane*, 82 Ill. 177; *Pierce v. Langdon*, 3 Idaho, 141, 28 Pac. 401 (claim and delivery).) There is no allegation in the complaint that at the time of the commencement of the action plaintiff was entitled to the immediate possession of the chattels. (*Fredericks v. Tracy*, 98 Cal. 658, 33 Pac. 750; *Gaynor v. Blewitt*, 69 Wis. 582, 34 N. W. 726; *Holly v. Heiskell*, 112 Cal. 174, 44 Pac. 466; *Pierce v. Langdon*, 3 Idaho, 141, 28 Pac. 401.) The lower court sustained a demurrer to the defense, holding that a constable cannot enforce an execution issued out of a probate court. The following sections of our statute not only confer the right, but make it

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imperative that he do so; Constable must execute, serve and return process (Idaho Rev. Stats., sec. 2090); he is governed by the same laws as the sheriff, (Idaho Rev. Stats., sec. 2091.) The probate court is "competent authority" to issue an execution addressed to a constable. (Idaho Rev. Stats., sec. 4742.) "Executions issued out of probate courts in this state must run to the sheriff or to a constable of the county." (Rev. Stats., sec. 4742.) "An execution is a process." (Idaho Rev. Stats., sec. 16, subd. 6, sec. 1870; *People v. Nush*, 1 Idaho, 206.) The supreme court of this state has expressly held that a constable may justify under a writ of execution issued to him. (*Pecotte v. Oliver*, 2 Idaho, 251, 10 Pac. 302; *Hallett v. Parish*, 5 Idaho, 496, 51 Pac. 109.) The answer specifically denies the ownership of the property, denies right of possession in plaintiff, denies the damages, denies the values, denies the taking, and denies the detention. Under the denial of ownership, defendant was entitled to prove ownership in a third person. (*Lindsay v. Watt*, 1 Idaho, 738.) Notwithstanding these specific denials, the court gave judgment on the pleadings. These denials are not negatives pregnant. Pleadings, under the reform procedure, should be liberally construed. (Idaho Rev. Stats., secs. 4, 4207, 4231; Pomeroy's Code Remedies, secs. 545-547; *Cantwell v. McPherson*, 3 Idaho, 721, 34 Pac. 1095.) This rule, applied to the denials, affirmatively shows that each every and all of the material allegations of the complaint are denied. But the court gave judgment on the pleadings. This, of course, is reversible error. (*Aulspaugh v. Reid*, ante, p. 223, 55 Pac. 300; 11 Ency. of Pl. & Pr., p. 865, point 7; Idaho Rev. Stats., sec. 4369.)

S. S. Denning and Warren Truitt, for Respondent.

If the sheriff seizes the property of one not the defendant, no demand is necessary prior to the commencement of the action. (*Ledley v. Hayes*, 1 Cal. 160; *Sargent v. Strong*, 23 Cal. 159; *Boulware v. Craddick*, 30 Cal. 190; *Wellman v. English*, 38 Cal. 583; *Shannon v. Nunan*, 63 Cal. 234; *Kane v. Desmond*, 63 Cal. 464; *Black v. Clasby*, 97 Cal. 482, 32 Pac. 564.)

SULLIVAN, J.—This is an action for the wrongful taking and detention of certain personal property. It appears from

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the transcript that a judgment was entered in the probate court of Latah county against C. A. Christopher, and in favor of C. A. Burror, for the sum of \$260.40, and execution was issued thereon, directed to the sheriff or any constable of said county, commanding them to make said judgment and costs out of the property of said Christopher. The execution was placed in the hands of J. R. Collins, the defendant herein, who was a qualified and acting constable of Juliaetta precinct, in said Latah county, for service. Said constable thereafter levied the same, as shown by his return, on one hundred and twenty-seven sacks of wheat, seventeen sacks of beans, four hundred fir posts, and four tons of hay, which property was thereafter sold by him, and the proceeds applied on said judgment. It also appears that said property, when the execution was levied thereon, was on the ranch of said defendant, Christopher, and in the immediate possession of one Luke Hale, the tenant of said Christopher, and was rent originally owing from said Hale to said Christopher. It is also alleged in the complaint that said Christopher assigned to the plaintiff said personal property on the twenty-fourth day of April, 1897, and left the same in the possession of said Hale, on the ranch of said Christopher, where it had been prior to said assignment. In regard to the time when the plaintiff was entitled to the possession of said property, the complaint alleges as follows: "That before this action, to wit, on the second day of October, 1897, the time which the said Luke Hale was to safely hold the said goods had expired, and thereupon the plaintiff became entitled to the immediate and exclusive possession of the said goods and chattels." It appears from said allegation that this plaintiff was not entitled to the possession of said property until the second day of October, 1897. The execution was levied thereon on the first day of October, 1897, one day before the plaintiff was entitled to the possession thereof, according to said allegation of his complaint. However, the defendant answered, and denied specifically each allegation of the complaint. While the denials are faulty, and not in the best form, yet we think them sufficient to put in issue the material allegations of the complaint. As an affirmative defense, the answer sets up that the defendant was, at the

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time of taking said property, a duly elected, qualified, and acting constable of Juliaetta precinct, in said Latah county; that an execution was duly issued out of the probate court of said Latah county, on a judgment duly entered by said court, against said Christopher, and placed in his hands as such constable, for service; that he levied upon said property as the property of said defendant, setting forth fully what he did under said writ of execution. The plaintiff demurred as follows: "Comes now plaintiff herein, and demurs to the separate defense in the defendant's answer herein filed, for the reason that the same does not constitute a defense or a sufficient justification to the matters alleged in the complaint"—which demurrer was sustained by the court. The cause coming on for trial, a jury was impaneled to try the cause. Immediately thereafter counsel for plaintiff moved for judgment on the pleadings, on the ground that there was no issue tendered by the answer, which motion was sustained by the court. Thereupon the court instructed the jury to bring in a verdict in accordance with the prayer of the complaint, which was done, and judgment, in accordance with said verdict, was duly entered, to all of which counsel for defendant duly excepted. This appeal is from the judgment, and presented on the judgment-roll, which contains a bill of exceptions.

Four errors are assigned. The first is to the effect that the court erred in sustaining the demurrer of plaintiff. The trial court sustained said demurrer, on the ground that a constable cannot execute a writ of execution issued out of a probate court. Under section 1882 of the Revised Statutes, a ministerial officer may justify in the execution of process regular on its face, and issued by competent authority. (See, also, *Pecotte v. Oliver*, 2 Idaho, 251, 10 Pac. 302; *Roth v. Duvall*, 1 Idaho, 149; *Hallett v. Parrish*, 5 Idaho, 496, 51 Pac. 109.) Under section 2090 of the Revised Statutes, constables must execute, serve, and return process, and are governed by the same laws as the sheriff. (Rev. Stats., sec. 2091.) Under section 4742 of the Revised Statutes, the probate court is authorized to issue an execution addressed to a constable. Said section declares that executions issued out of probate courts of this state must run to

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the sheriff or to a constable of the county. Probate courts have jurisdiction "to hear and determine all civil causes wherein the damages or debt claimed does not exceed the sum of \$500, exclusive of interest, and concurrent jurisdiction with justices of the peace in criminal cases." (Rev. Stats., sec. 3841, subd. 9.) Justices of the peace have jurisdiction to hear and determine all civil cases wherein the sum claimed does not exceed \$300. (Rev. Stats., sec. 3157, subsec. 1.) Probate courts and justices' courts have concurrent jurisdiction in civil cases wherein the damages or debt claimed does not exceed \$300. The judgment on which said execution was issued was for the sum of \$206.40. It was a case in which the probate court and a justice of the peace had concurrent jurisdiction, and there is no question in the mind of this court but that a constable has full and complete authority to execute process from a probate court in such cases. That being true, the court erred in sustaining said demurrer.

The second error assigned is that the court erred in sustaining the motion for judgment on the pleadings. The decision of the motion last above referred to virtually sustains the counsel for appellant in the error now under consideration. If the defendant's separate defense was a valid one, the plaintiff was not entitled to judgment on the pleadings. Nor do we think he was entitled to judgment on the pleadings under the specific denials contained in the answer. The material allegations of the complaint were denied by the answer. When that condition exists, the court is not authorized to enter judgment on the pleadings. Evidence must be heard in order to determine the facts in issue. In the case at bar, the plaintiff demands damages in the sum of fifty dollars. The defendant denies the allegation for damages. The court erred in entering judgment for damages without hearing any testimony upon that issue.

The decision of the second assigned error disposes of the third and fourth assignments in favor of the appellant.

It is contended that the complaint shows an attempted sale of personal property without a change of possession, and is therefore fraudulent and void, under the provisions of section 3021 of the Revised Statutes. (*Harkness v. Smith*, 3 Idaho, 321, 28 Pac. 423; *Hallett v. Parrish*, 5 Idaho, 496, 51 Pac.

109; *Lawrence v. Burnham*, 4 Nev. 361, 97 Am. Dec. 540.) Plaintiff sues for the value of certain personal property alleged to have been wrongfully taken and detained by the defendant. It is shown that the property in controversy was for rent due from one Luke Hale to one Christopher for the rental of said Christopher's ranch, which property Hale held for Christopher. Said Christopher assigned the same to the plaintiff on the twenty-fourth day of April, 1897, and left it just where it was before, and at the time of said assignment, to wit, on the ranch of Christopher, in the possession of Hale, Christopher's tenant. It is further shown that said Hale was to hold and keep said property until the second day of October, 1897, at which time the plaintiff became entitled to the immediate and exclusive possession of the same. On the first day of October, 1897, one day before the plaintiff became entitled to the "immediate and exclusive possession of said goods," as shown by the sixth paragraph of the complaint, the defendant levied said execution upon said property, as property of said Christopher. We do not think the transfer of said property from Christopher to the respondent, as shown by the record, was accompanied by such immediate delivery, and followed by an actual and continued change of possession of said property, as contemplated by the provisions of said section 3021 of the Revised Statutes. The case of *Mosgrove v. Harris*, 94 Cal. 162, 29 Pac. 490, is a case like the one at bar. In that case it is held that a sale of hogs on a ranch, in the possession and occupancy of the seller, is not accompanied by such an immediate delivery, and actual and continued change of possession, as required by the statute, if, after the sale, they are allowed to remain upon the ranch in charge of the same persons who had charge of them before the sale, although such persons were requested, after the sale, to take charge of them for the buyer, and consented to do so.

It is contended by appellant that said complaint is insufficient, because it does not allege a demand for the return of said property before this action was commenced. There is nothing in this contention. This is not a suit for recovery of certain specific property. It is an action in tort, and the record

Argument for Plaintiff.

shows that said property had passed out of the possession of defendant, and that a demand would have been utterly useless. In such cases, no demand is necessary. (Cooley on Torts, 2d ed., 530.) The judgment must be reversed, and the cause remanded; and it is so ordered. Costs of appeal are awarded to the appellant.

Huston, C. J., and Quarles, J., concur.

(May 9, 1899.)

STOOKEY v. BOARD OF COUNTY COMMISSIONERS
OF NEZ PERCES COUNTY.

[57 Pac. 312.]

CONSTITUTIONAL LAW—SALARIES—COUNTY OFFICERS—PUBLIC POLICY.

The legislature has authority to provide by statute the maximum and minimum salary of county officers, and may vest in the boards of county commissioners the discretionary authority of determining the amount of salary of county officers within the limit of such maximum and minimum salary, except the salary of such county commissioners. Public policy forbids that any officer be empowered to fix his own compensation.

(Syllabus by the court.)

An original proceeding supreme court.

C. J. Orland and James W. Reid, for Plaintiff.

Section 7 of article 18 of the constitution provides that the salaries of county officers shall be "a fixed annual salary." The legislature might perhaps have been nearer the constitutional requirement had it provided that the salaries be fixed annually. It would then have had an annually fixed salary, which it now has not. Instead of having a fixed salary, by this act we have a fluctuating salary, according to the whim, extravagance, parsimony or political prejudice which may control the minds and acts of men, and more especially is this true if the present board of commissioners can fix the salaries of the present officers. By section 1 of article 3 of the constitution the legislative power of the state is vested in a

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Senate and House of Representatives, and by section 5 of article 18 it is provided that "The legislature shall establish . . . a system of county governments." By the provisions of section 1 of article 3, all legislative power is vested in the bodies provided for, and by section 5 of article 18, this body is expressly charged with certain duties as to counties. These sections do not provide, nor by any implication can they be construed as authorizing the legislature to delegate or shift the burden of legislation to the several counties of the state, as to their system of government or any part of it, which this act directly attempts to do. It delegates to the board of county commissioners of the several counties to legislate or enact a law as to the compensation which shall be paid themselves for the next two years, and all other of the county officers now in office, and also for the county officers to be elected for the next two years, and every two years thereafter the boards resolve themselves into a legislature and proceed to enact salary laws for their successors. By the clearest implication the legislature would be prohibited from conferring authority upon such boards to fix the salaries of other county officers. (*Page v. Allen*, 58 Pa. St. 338, 98 Am. Dec. 272.) The usual and elementary construction of constitutions require uniformity, and ours is no exception to the rule. The expression is repeatedly used, and by necessary implication must be so. (*Miller v. Kister*, 68 Cal. 142, 8 Pac. 813; *Smith v. Judge*, 17 Cal. 554.) Local and special laws are expressly prohibited by the constitution with reference to officers' salaries during their term of office. (Section 19 of article 3, last paragraph of constitution; *Smith v. McDermott*, 93 Cal. 421, 29 Pac. 34; *People v. Central Pacific Ry.*, 83 Cal. 393, 23 Pac. 303; Am. & Eng. Ency. of Law, 1st ed., 695.) This is an attempt at clear delegation of legislative authority by the legislature to twenty-one boards of county commissioners or twenty-one legislative bodies, who, if their act is valid, are authorized to exercise important functions. We claim that such power cannot be delegated. (*State v. Simons*, 32 Minn. 540, 21 N. W. 750; *Commonwealth v. Addams*, 95 Ky. 588, 26 S. W. 581; *Douling v. Lancashire Ins. Co.*, 92 Wis. 63,

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65 N. W. 738; *State v. Young*, 29 Minn. 474, 9 N. W. 754; *Ex parte Wall*, 48 Cal. 315, 17 Am. Rep. 425; *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. Rep. 495; *Dougherty v. Austin*, 94 Cal. 601, 28 Pac. 834, 29 Pac. 1092.) This act by reason of its operation is special, as it is to be applied to each of the counties of the state, at the arbitrary discretion of the boards of county commissioners of each county, and will act upon each county in an independent manner without any regard to uniformity or classification, and its effect in each county is to that county alone. (*City of Topeka v. Gillett*, 32 Kan. 431, 4 Pac. 800.) The salaries of the officers of counties is a part of the county government. (*Longan v. County of Solano*, 65 Cal. 123, 3 Pac. 463.) Under the provisions of section 5 of article 18, the constitution must be uniform throughout the state, and which has been conclusively demonstrated by the actions of the various boards, in the fixing of the salaries, has not been obtained, and of necessity cannot be, and is therefore in violation of this section of the constitution. (*State v. Boyd*, 19 Nev. 43, 5 Pac. 735; *Dougherty v. Austin*, 94 Cal. 603, 28 Pac. 834, 29 Pac. 1092; *Miller v. Kister*, 68 Cal. 142, 8 Pac. 813; *Smith v. Judge*, 17 Cal. 554.)

S. H. Hays, Attorney General, for Defendants.

It is true that few laws of exactly this kind have been before the courts for adjudication, but this argument is the same which is usually most strenuously advanced against laws which classify counties, either by population or taxable property, it being contended in those cases that the legislature, knowing the population or taxable property of each county and fixing the classification on that basis, might as well have named each county specifically. The argument is as valid against the classification system as against the one in question. The classification system has, however, been held to be clearly constitutional. (*Harwood v. Wentworth*, 162 U. S. 547, 16 Sup. Ct. Rep. 890; *Seabolt v. Commissioners*, 187 Pa. St. 318, 41 Atl. 22.) Special laws are those made for individual cases, or for less than a class requiring laws appropriate to its peculiar condition and circumstances; local laws are special as to

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place. (Sutherland on Statutory Construction, sec. 127; *Tulare Co. v. May*, 118 Cal. 303, 50 Pac. 427; *Stone v. Wilson*, 19 Ky. Law Rep. 126, 39 S. W. 49; *People v. Onahan*, 170 Ill. 449, 43 N. E. 1003; *Fleckenstein v. Placer Co.* (Cal.), 37 Pac. 931; *Johnson v. McCabe*, 1 Okla. 204, 32 Pac. 336; *McInerney v. City of Denver*, 17 Colo. 302, 29 Pac. 516; *People v. Dunn*, 157 N. Y. 528, 52 N. E. 572.) It has been the policy of our laws for many years to empower county boards to fix the salaries of county officers. (*Ryan v. Outagamie County*, 80 Wis. 336, 50 N. W. 340; *Staples v. Llano County*, 9 Tex. Civ. App. 203, 28, S. W. 569; *Stanfield v. State*, 83 Tex. 317, 18 S. W. 577; *Stone v. Wilson*, 19 Ky. Law Rep. 126, 39 S. W. 49.) In a constitutional sense, however, these duties cannot be said to be legislative, executive or judicial, but, as modern law-writers term them, they are purely administrative. Administrative duties of this kind are frequently imposed upon boards. (*Board of Commissioners v. Smith*, 22 Colo. 534, 45 Pac. 357; *Board of Directors v. Collins*, 46 Neb. 411, 64 N. W. 1086; *Nelson v. Troy*, 11 Wash. 435, 39 Pac. 974; *Board of Law Library Trustees v. Board of Supervisors*, 99 Cal. 571, 34 Pac. 244; 8 Am. & Eng. Ency. of Law, 911; *People v. Kipley*, 171 Ill. 44, 49 N. E. 229; 6 Am. & Eng. of Law, 2d ed., 1029; *Müller v. State*, 149 Ind. 607, 49 N. E. 894.) The fact that an alternative is open to the commissioners in administering the law is no proof of lack of uniformity. (*Hellman v. Shoulters*, 114 Cal. 136 (146), 44 Pac. 915, 45 Pac. 1057.)

QUARLES, J.—This is an original proceeding, commenced by the plaintiff, who is clerk of the district court and *ex-officio* auditor and recorder in and for Nez Perces county, to obtain a writ of prohibition prohibiting the defendants, as commissioners of said county, from fixing the salary of the plaintiff as said officer for the years 1899 and 1900. The contention upon which this proceeding is based is that the act of March 7, 1899, known as the "County Salary Bill," is in contravention of the constitution and void. By joint resolution submitted to the electors of the state by the legislature at its fourth session, 1897, and adopted at the general election in November, 1898, Idaho, Vol. 6—35

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section 7, article 18, of the constitution was amended so as to read as follows: "Sec. 7. All county officers, and deputies when allowed, shall receive, as full compensation for their services, fixed annual salaries, to be paid quarterly out of the county treasury, as other expenses are paid. All actual and necessary expenses, incurred by any county officer or deputy in the performance of his official duties, shall be a legal charge against the county, and may be retained by him out of any fees which may come into his hands. All fees, which may come into his hands from whatever source, over and above his actual and necessary expenses, shall be turned into the county treasury at the end of each quarter. He shall, at the end of each quarter, file with the clerk of the board of county commissioners a sworn statement, accompanied by proper vouchers, showing all expenses incurred and all fees received, which must be audited by the board, as other accounts." The act of March 7, 1899, was enacted for the purpose of carrying into effect the above provision of the constitution. Said act fixes the maximum and minimum compensation to be received by the different county officers, leaving the exact amount of the salary of each county officer to be fixed by the board of county commissioners in the respective counties. Plaintiff contends that the act is local and special. This contention is not well founded, as the act is general in its nature and terms, and applies equally to every county in the state.

The second point urged by the plaintiff is that the "said act is an attempt to grant legislative power to the board of county commissioners, and is a delegation of legislative functions." This point raises the serious question in this case. If the legislature is prohibited from vesting in the county commissioners the discretionary power of fixing the compensation of county officers within certain prescribed limits, it is by the provisions of our constitution, and not otherwise. The vesting of such discretionary power in the board of county commissioners, except with reference to their own salaries, is not forbidden by, or contrary to, public policy. Is it forbidden by any provision of the constitution? We think not. We find nothing in our

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constitution prohibiting it. The people have, in the constitution, granted this discretionary power to the boards of county commissioners with reference to one of the county officers, viz., county attorney thus shaping public policy with reference to the question under consideration. The principle of vesting this discretionary power in the boards of county commissioners being indorsed by the people in the constitution, there being nothing in the constitution prohibiting the act in question, and the people having declared by the said constitutional provision that county officers should be paid by salaries, and not by fees, we feel it our duty to hold the act in question valid. except that part of it relating to the salaries of county commissioners. While the wisdom of the act in question may well be doubted, and while we think that an act classifying the counties of the state, and absolutely fixing the salaries of the different county officers in each class of counties, would be better, yet the question before us is not which would be the better way of doing it. That question is to be decided by the legislature. We appreciate the difficulties experienced by the legislature in providing for compensation of the different officers in the various counties. Novel conditions exist in this state. We have a large area. Some of the counties are large in area, while others are small. Some are sparsely settled, while others are populous. Some have easy shipping facilities, while others are isolated and distant from railroads, making traffic expensive. Owing to this diversity of conditions, the cost of living in one county is much more than in others. It would not be fair or equitable to require an officer in a county where it is costly to live to work for the same salary paid the same officer performing the same amount of work in a county where it would cost only half as much to live. Taking into consideration these diverse conditions, the legislature considered that the amount of salaries ought to be determined in the various counties with reference to the amount of work to be performed and the cost of living. It would not be fair or just to the officers or to the taxpayers for the county officers of Ada, Latah, and Shoshone counties to be paid the same salaries as those paid to the county officers

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of Custer, Lincoln, and Bear Lake counties. To provide a uniform system which would be just to the office holder and to the taxpayer, the act in question was passed. The legislature could not well make the salaries of the different county offices uniform throughout the state, for to do so would be an act of injustice to some of the officeholders and to some of the taxpayers. Considering all of the existing conditions, the legislature thought it best to fix the maximum and minimum compensation of the various county officers, and leave a certain discretion to the county commissioners. It is our pleasure to sustain the act in question, with one exception. There is nothing in our constitution, which, directly or indirectly sanctions the principle of a county officer fixing his own salary. On the other hand, the trend of our laws, both fundamental and statutory, and public policy, forbid the principle. We do not think that the legislature has authority to vest even a discretionary power in any officer to fix his own salary. Common honesty, public morals, and the protection of the individual citizen demands, *pro bono publico*, that such a practice should not be tolerated. It is a well-defined public policy in this state that no person acting in an official capacity shall fix the price of materials furnished the public, or fix the compensation for services rendered or to be rendered by him for the public. The law wisely protects a public officer from the temptation of being too generous in the matter of fixing his own compensation. Our conclusion is that the act in question is valid, except that part thereof which attempts to authorize county commissioners to determine what amount of salary between \$150 and \$1,000 per annum they shall receive. Inasmuch as boards of county commissioners in the various counties of the state have already, by order, designated the salaries to be received by all county officers, we deem it best to suggest that the orders made by the boards of county commissioners, so far as their own compensation is concerned, are void, and that, until further legislation is had, county commissioners will receive the compensation now fixed by statute, viz., "six dollars for each day actually and necessarily engaged in transacting county business, not to exceed five hundred (\$500) dollars for any one year," and "all actual and necessary

Argument for Appellant.

expenses incurred" by them "in the performance of official duty." The constitutional amendment and act under consideration repeals that part of the act of February 23, 1893, which allows mileage to county commissioners. It is a matter of great regret, if not public calamity, shown by the public history of the state, that in some of the counties the county commissioners, contrary to law and common decency, have made orders allowing themselves and other officers quarterly salary in advance. Such acts were not contemplated either by the constitution or act in question. We deem it best to suggest that the authority vested by the act in question is not an arbitrary, but discretionary, power, and in any case in which their discretion is abused the party aggrieved may obtain redress by appeal, as in case of other orders made by county commissioners. The writ demanded is denied. Costs awarded to neither party.

Huston, C. J., and Sullivan, J., concur.

(May 11, 1899.)

QUAYLE v. GLENN.

[57 Pac. 308.]

JURISDICTION OF JUSTICES' COURTS.—Under the provisions of section 3851 of the Revised Statutes, justices' courts, in actions arising on contract for the recovery of money, only have jurisdiction where the sum claimed does not exceed the sum of \$300. The sum claimed, including damages or principal and interest thereon, cannot exceed the sum of \$300. Section 22, article 5, of the constitution of Idaho fixes the maximum beyond which the legislature cannot go in fixing such jurisdiction as to value of property claimed or amount in controversy.

(Syllabus by the court.)

APPEAL from District Court, Bear Lake County.

John A. Bagley, for Appellant.

The statement is the authority for the justice to enter judgment, and his sole authority. Any defects in it are jurisdic-

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tional and fatal. Nothing can be presumed in favor of the jurisdiction of courts or magistrates having special or limited jurisdiction. The record should show that the judgment was within the limits of their jurisdiction. (*Henry v. Estes*, 127 Mass. 474; *Hendrick v. Whittemore*, 105 Mass. 23, 27; *Tucker v. Harris*, 13 Ga. 1, 53 Am. Dec. 488; *Palmer v. Oakley*, 2 Doug. (Mich.) 433, 47 Am. Dec. 41.)

Allen Miller and T. L. Glenn, for Respondents.

The justice had jurisdiction both of the subject matter of the action and of the person of the defendant, Quayle, and having jurisdiction, his judgment is not void. (*Chase v. Christenson*, 41 Cal. 253; *Moore v. Martin*, 38 Cal. 428; *Sweet v. Ward*, 43 Kan. 695, 23 Pac. 941.)

SULLIVAN, J.—This suit was brought to perpetually enjoin the enforcement of a judgment entered in a justice's court against appellant for the sum of \$401.80 damages. The complaint in said court prayed for judgment for the sum of \$291.35 principal, and interest claimed to be due thereon, amounting to \$110.45, making a total demand of \$401.80, all of which appears from the judgment-roll. The question as to the jurisdiction of the justice of the peace to enter judgment was not raised in the court below, but it is a question that may be raised at any time. In deciding this question, we have examined the laws of Congress pertaining to the creation of Idaho territory, and acts amendatory thereof, and we find that section 1927 of the Revised Statutes of the United States, as found on page 38 of the Revised Statutes of Idaho of 1887, provides that justices of the peace "shall not have jurisdiction of any matter in controversy where the debt or sum claimed exceeds three hundred dollars." The legislature of the then territory of Idaho, in defining the jurisdiction of justices of the peace, uses substantially the same language used in said act of Congress. It is provided, among other things, in section 3851 of the Revised Statutes that the jurisdiction of a justice's court shall extend to actions arising on contract for the recovery of money only where the sum claimed does not exceed the sum of \$300. The

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\$300 includes the interest, if any be due, as well as the principal debt sued for. The acts of Congress relating to Idaho territory, commonly known as the "Organic Act," was the supreme law of Idaho at the time of the adoption of the Revised Statutes of Idaho (1887), and the legislature, in adopting said section 3851, merely re-enacted the provisions of said organic act so far as the point under consideration is concerned. Had Congress or the legislature intended to exclude the interest due on claims sued for, apt words to that effect would have been used, as was done in fixing the jurisdiction of probate courts. Section 1907 of the Revised Statutes of the United States (see page 36 of the Revised Statutes of Idaho, 1887), authorized probate courts of Idaho territory as follows: "To hear and determine all civil causes wherein the damage or debt claimed does not exceed the sum of \$500, exclusive of interest." And the legislature of Idaho territory, in section 3841 of the Revised Statutes of Idaho, used substantially the same words in fixing the jurisdiction of probate courts. The words "exclusive of interest" are used in fixing the jurisdiction of probate courts, while in fixing the jurisdiction of justices' courts those words are not used. Had Congress or the legislature intended to exclude interest when fixing the jurisdiction of the last-named courts, the words "exclusive of interest" would have been used, as was done in fixing the jurisdiction of probate courts. It has been suggested that section 22 of article 5 of the constitution of Idaho, adopted in 1890, extends the jurisdiction of justices of the peace to \$300 "exclusive of interest." Said section provides as follows: "Justices of the peace shall have such jurisdiction as may be conferred by law, but they shall not have jurisdiction of any cause wherein the value of the property or the amount in controversy exceeds the sum of \$300, exclusive of interest, nor where the boundaries or title to any real property shall be called in question." That section does not extend the jurisdiction of justices of the peace to the sum of \$300 exclusive of interest. It is, however, a limitation on the legislature, and prohibits the fixing of said jurisdiction beyond the sum of \$300 exclusive of interest. It declares that

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justices of the peace shall have such jurisdiction as may be conferred by law, not exceeding \$300 exclusive of interest. The provisions of said section 3851 of the Revised Statutes of Idaho of 1887 was continued in force by the provisions of section 2, article 21 of the constitution of Idaho, as its provisions are not repugnant to any of the provisions of the constitution. As the justice of the peace did not have jurisdiction to enter the judgment sought to be enjoined, it is absolutely void, and for that reason the judgment appealed from must be reversed, and the cause remanded, with instructions to set aside the same, and to enter judgment as prayed for by appellant in his complaint, perpetually enjoining the enforcement of said judgment entered by said justice of the peace. As the question of the jurisdiction of said justice of the peace to enter said judgment was not raised in the court below, it is ordered that each party pay his own costs on this appeal.

Huston, C. J., and Quarles, J., concur.

(May 11, 1899.)

OCOBOCK v. NIXON.

[57 Pac. 309.]

USURY—JUDGMENT UPON STIPULATION.—Plaintiff brought action upon a usurious contract; judgment was entered upon stipulation of parties in favor of plaintiff, as prayed in complaint, from which defendant appealed; *held*, that the judgment so entered, being in contravention of the usury laws of the state, the same was erroneous. The general rule, that where judgment is entered upon the agreement and consent of parties appeal will not lie, does not apply to a case where such agreement and judgment is in contravention of the positive provisions of a statute.

(Syllabus by the court.)

APPEAL from District Court, Nez Perces County.

James W. Reid, for Appellant.

No brief filed.

Argument for Respondent.

James W. Poe and James E. Babb, for Respondent.

Where an order or judgment has been entered by the court below on the agreement of the parties, as was done by the court below in this cause, and not pursuant to the judgment or action of the court, neither party has any remedy by appeal from such action of the court done by consent of the parties, because it is considered the parties have no right to allege error in that to which they have consented, or to seek reversal of the action of the court below, which they have caused by their request and consent, without having made a motion to the court below asking for correction of the error, and giving the court below an opportunity to take action upon the matter, which opportunity it had not previously had, because having relied upon the consent and stipulation of the parties. (*Schmidt v. Oregon Gold Min. Co.*, 28 Or. 9, 52 Am. St. Rep. 759, 40 Pac. 406, 1014; *Erlanger v. Southern Pacific R. Co.*, 109 Cal. 395, 42 Pac. 31; 2 Ency. of Pl. & Pr. 99; *Atkinson v. Manks*, 1 Cow. 691; *Peterson v. Swan*, 119 N. Y. 662, 23 N. E. 1004; *Chapin v. Perrin*, 46 Mich. 130, 8 N. W. 721; *In re Pemberton*, 40 N. J. Eq. 520, 4 Atl. 770.) Assuming for argument that the foregoing contention of respondent against the right of appellants to maintain this appeal is untenable, and that the appeal is to be heard upon the merits, counsel for respondent admit that the face of the records shows that the note secured by mortgage sought to be foreclosed was usurious within the decision of this court in *Vermont etc. Trust Co. v. Hoffman*, 5 Idaho, 376, 49 Pac. 314, and later cases, because the note appears on the face of the record to stipulate for interest on interest in advance of the maturity of the interest. That being the case, the judgment must be reversed, but at the cost of the appellants, as we contend. Where judgment is reversed on a point not made in the court below, cost may be withheld in the appellate court. (*Snell v. Race*, 78 Mich. 334, 44 N. W. 286; *Capwell v. Baxter*, 58 Mich. 571, 25 N. W. 493; *Clark v. Raymond*, 27 Mich. 456; *Hersey v. Milwaukee Co.*, 16 Wis. 185, 82 Am. Dec. 713; *Frowner v. Johnson*, 20 Ala. 477.) Also, unless the point should have been called to the attention of the trial court by the successful appellant, in which case he

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must pay costs. (*Roberts v. Hamilton*, 15 Ind. 305; *Jones v. Phelps*, 2 Barb. Ch. (N. Y.) 440; *Steward v. Green*, 11 Paige (N. Y.), 535; *McMullen v. Jewill*, 3 La. Ann. 139; *Wilson v. Lyon*, 51 Ill. 530; *Davidson v. Bond*, 12 Ill. 84.)

HUSTON, C. J.—This action was brought to foreclose a mortgage on real property. No answer was filed by the defendants, or either of them. Judgment and decree of foreclosure were entered under a stipulation of the parties. By the terms of the stipulation it is agreed "that the plaintiff may have judgment and decree as prayed for in his complaint, and that no execution or order of sale shall issue thereon until the expiration of five months from the rendition of said decree." Decree and judgment were rendered in accordance with such stipulation on April 7, 1898. The notes and mortgage sued on are set forth in the complaint by copy, from which it appears that the same come within the inhibition of the usury statutes of Idaho and the ruling of this court in the cases of *Vermont etc. Trust Co. v. Hoffman*, 5 Idaho, 376, 49 Pac. 314, and *Vermont etc. Trust Co. v. McGregor*, 5 Idaho, 510, 51 Pac. 104. But it is urged that, as this question was not raised in the lower court, it cannot be made a subject of review in the appellate court; that the error, if any was committed, was by the consent of both parties, with a full knowledge of all the facts, and in fact was not the error of the court, but of the parties, and is not, therefore, subject to appeal. This position of respondent seems to be supported by abundant authority, and is, we think, the general rule. But the case at bar presents some peculiar features, which would seem to except it from the operation of the general rule. Section 1266 of the Revised Statutes provides: "If it is ascertained in any suit brought on any contract, that a rate of interest has been contracted for greater than is authorized by this chapter, either directly or indirectly, in money or in property, such contract works a forfeiture of ten cents on the hundred by the year, and at that rate, upon the amount of such contract, to the school fund of the county in which the suit is brought, and the plaintiff must have judgment for the principal sum, less all payments of principal or

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interest theretofore made and without interest or costs. The court must render judgment in said action for ten per cent per annum upon the entire principal of said contract, against the defendant in favor of the territory (state), for the use of the school fund of the county, whether the unlawful interest is contested or not; and in no case where unlawful interest is contracted for, must the plaintiff have judgment for more than the principal sum less the payments already made, whether the unlawful interest be incorporated with the principal sum or not." Can the provisions of this statute, and the duty of the court thereunder, be abrogated by stipulation of the parties? We think not. Statutes against usury are penal in their character, and where, as in this state, it is provided that the penalty, or a part thereof, shall go to the state or to the school fund of the county, and imposes upon the court the duty of rendering judgment for such penalty, such duty cannot be evaded, to the injury of the state or the school fund, by stipulation of parties. The plaintiff seeks a judgment upon a usurious contract. The statute makes it the duty of the court, whenever the nature of the contract sued upon is ascertained to be usurious under the statute, to render judgment for the penalty. The law leaves the court no discretion in this matter. It directs the judgment it shall enter, and any other or different judgment is erroneous. The judgment of the district court is reversed, and the cause remanded, with direction to enter judgment in accordance with the provisions of section 1266 of the Revised Statutes of Idaho. No costs allowed appellants.

Quarles and Sullivan, JJ., concur.

Argument for Appellants.

(May 11, 1899.)

CARTER v. WANN.

[57 Pac. 314.]

PLEADINGS — PRACTICE — DEMURRER — ANSWER.—Objections to a complaint that "the action is not brought in the name of the real parties in interest, as is shown by the face of the complaint"; "that the plaintiff has not legal capacity to sue in this action; that several causes of action have been improperly united"; "that the complaint is ambiguous, unintelligible and uncertain," must be taken by demurrer, or answer, and when not so taken will be deemed to be waived.

SAME—GENERAL DEMURRER.—When the complaint states a good cause of action, although joined with a cause of action that is demurrable, a general demurrer that the complaint does not state facts sufficient to constitute a cause of action, will not lie.

TRESPASS UPON LANDS OF INDIANS BY ALLOTMENT.—Indians holding lands by allotment are entitled to bring suit for trespass upon such lands.

(Syllabus by the court.)

APPEAL from District Court, Nez Perces County.

H. F. Burleigh, for Appellants.

A person cannot sue in his own right and also in a representative capacity in the same action. (1 Ency. of Pl. & Pr., 177; Bliss on Code Pleadings, c. 3, sec. 22, c. 9, sec. 117, c. 20, secs. 408, 413, 414.) Sections 1300 and 1301 and sections 1320, 1321 of the Revised Statutes of Idaho, and amendments thereto, are as much in force in this state as sections 1210 and 1211, and that said sections of the statute must be construed together, and that no damages can be recovered for trespass upon uninclosed lands of an individual. (*Logan v. Gedney*, 38 Cal. 579; *Rivers v. Burbank*, 13 Nev. 398; Idaho Rev. Stats., secs. 1300, 1301, 1320, 1321.) The land in question is government land, and will remain so for about twenty years yet, and plaintiff may never acquire title to the same. The land has never been segregated from the public domain. (Idaho Rev. Stats., c. 4, tit. 10; *Wolfskill v. Malajowich*, 39 Cal. 276; *Logan v. Gedney*, 38 Cal. 579.)

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James W. Reid, for Respondent.

The record shows that William Carter was the owner and lawfully in possession of the land. This disposes of the error alleged, that he is not the real party in interest, or that several causes of action have been improperly united. The other objection that the plaintiff has not legal capacity to sue in this action was settled in this court by a recent decision. (*Wa-La-Note-Tke-Tynin v. Carter*, ante, p. 85, 53 Pac. 106.)

HUSTON, C. J.—This is an action brought in the justice's court, under the provisions of chapter 6, title 7, of the Revised Statutes. Section 1210 of the Revised Statutes provides as follows: It is not lawful for any person owning or having charge of sheep, to herd the same, or permit them to be herded, on the land or possessory claims of other persons, or to herd the same or permit them to graze within two miles of the dwelling-house of the owner or owners of such possessory claim." Sections 1211 and 1212 provide for the recovery of damages by the party injured by a violation of said section 1210. The plaintiff is a Nez Perces Indian, holding lands by allotment under the treaties between said Nez Perces Indians and the United States government.

The plaintiff's complaint alleges "that, during all the times hereinafter mentioned, he was and now is the owner and lawfully in possession of all that certain real estate situated in the county of Nez Perces, state of Idaho, and described as follows: Lots 14, 15, 16, 23, and 32, section 6, township 35 north, range 3 west, Boise meridian, containing one hundred acres, belonging to William Carter; lots 22, 33, 34, and 35, section 6, township 35 north, range 3 west, Boise meridian, containing eighty acres, allotted to Mary Carter, deceased; lots 8, 9, 24, and 25, section 5, lot 36, section 6, township 35 north, range 3 west, Boise meridian, containing one hundred and twenty-nine one-hundredths acres, allotted to Ip-nah-san-lah-kuskt; lots 6, 7, 12, 13, 24, 25, 30, and 31, section 6, township 35 north, range 3 west, Boise meridian, containing one hundred and sixty acres, allotted to Elizabeth Carter." Then follows the allegation of

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the trespass, the damage, and the prayer for judgment. No demurrer appears to have been filed to the complaint. The defendants answered separately, denying all the allegations of the complaint. The answers are identical. The record does not show the result of the trial in the justice's court, nor which party brought the case into the district court; but in the district court the cause was tried *de novo* without any alteration in, or amendment of, the pleadings filed in the justice's court. The cause was tried in the district court with a jury, who rendered a verdict in favor of plaintiff for the sum of \$100; and it is from the judgment entered upon said verdict, and the order overruling defendants' motion for a new trial, that this appeal is taken. At the trial in the district court the defendants objected to the introduction of any evidence, under the complaint, upon the following grounds: "1. That the action is not brought in the name of the real parties in interest, as is shown on the face of the complaint; 2. That the plaintiff has not legal capacity to sue in this action; 3. That several causes of action have been improperly united; 4. That the complaint does not state facts sufficient to constitute a cause of action; 5, That the complaint is ambiguous, unintelligible, and uncertain." These objections were all overruled by the court, and the action of the court therein is the first assignment of error by appellants.

Section 4174, chapter 3, title 6, of the Revised Statutes, gives the various grounds of demurrer to the complaint permissible under the Code of Civil Procedure, and section 4178 provides that, "if no objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action." To avail himself of objections 1, 2, 3, and 5, as above enumerated, the appellants should have raised them by demurrer, either in the justice's court or in the district court, when the cause came on for trial *de novo*. Not having elected to do so, they are deemed waived. As to the fourth objection, it is the recognized rule that, if a single cause

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of action is sufficiently stated in the complaint, this objection will not lie, or, rather, this ground of demurrer cannot obtain. It must be conceded, we think, that as to the one hundred acres of land, which the plaintiff claims to own in his own right, a good cause of action is shown, and this cause of action is not invalidated or impaired by being united with a cause of action which is demurrable. We think the ruling of the district court upon this question was correct.

There are several exceptions taken to the admission of evidence, but we are unable to find any prejudicial error in the ruling of the court thereon. Exception is taken by appellants to certain instructions to the jury, given by the court. The instructions excepted to are a simple *verbatim* recital of the statute. If objectionable, the objection should be urged against the legislature, which enacted the law, and not against the court which administered it.

The appellants' objection that plaintiff cannot recover in this action, because he has neither the constructive nor actual possession of the lands is not maintainable. This question was considered and decided by this court in the case of *Wa-La-Note-Tke-Tynin v. Carter*, ante, p. 85, 53 Pac. 106. As to the questions of fact in the case, while the evidence is somewhat conflicting, we think there is sufficient to support the verdict of the jury. The judgment and order of the district court are affirmed, with costs to the respondent.

Quarles and Sullivan, JJ., concur.

(May 12, 1899.)

GRAY v. LAW, ADMINISTRATOR.

[57 Pac. 435.]

MORTGAGE—MARRIED WOMAN—ACKNOWLEDGMENT.—Where a certificate of acknowledgment of a married woman is valid on its face, and is attacked on the ground that it is false, the validity of the certificate will be sustained, unless the proof of the falsity is clear and convincing, and establishes the fact beyond a reasonable doubt.

Argument for Appellants.

SAME—CERTIFICATE OF PROOF.—Public policy requires a certificate of acknowledgment, if in proper form, to prevail over the unsupported evidence of the grantor, and especially is that true where the grantor admits that she signed the instrument to which such certificate belongs.

(Syllabus by the court.)

APPEAL from District Court, Bear Lake County.

John A. Bagley and W. E. Borah, for Appellants.

The evidence of Mrs. Eliza Spence was incompetent and inadmissible to impeach the certificate of acknowledgment. The certificate of acknowledgment was in due and regular form. (*Northwestern etc. Bank v. Rauch*, 5 Idaho, 752, 51 Pac. 764; *Bunnell & Eno Inv. Co. v. Curtis*, 5 Idaho, 652, 51 Pac. 767; *Co-operative Savings etc. Assn. v. Green*, 5 Idaho, 660, 51 Pac. 770; *Christensen v. Holingsworth*, ante, pp. 87, 94, 53 Pac. 211, 271; *Curtis v. Bunnell etc. Co.*, ante, p. 298, 55 Pac. 659.) A certificate of acknowledgment regular in form can only be impeached upon the ground of fraud, and before parol testimony is admissible for this purpose there must be both an allegation of fraud and clear proof of fraud practiced upon the married woman in which the mortgagee took part or had notice of. (*Jones on Mortgages*, 500; *Devlin on Deeds*, 529, 535; *Browne on Parol Evidence*, 303, 304; *Kerr v. Russell*, 69 Ill. 666, 18 Am. Rep. 634; 2 *Wharton on Evidence*, 1052; *Johnston v. Wallace*, 53 Miss. 331, 24 Am. Rep. 699; *Freiberg v. De Lamar*, 7 Tex. Civ. App. 263, 27 S. W. 151; *Mather v. Jarel*, 33 Fed. 366; *Pierre v. Feagons*, 39 Fed. 587; *Young v. Duvall*, 109 U. S. 573, 3 Sup. Ct. Rep. 414; *Hitz v. Jenks*, 123 U. S. 297, 8 Sup. Ct. Rep. 143, 57 Cal. 141; *De Arnaz v. Escondon*, 59 Cal. 486; *Banning v. Banning*, 80 Cal. 271, 13 Am. St. Rep. 156, 22 Pac. 210; *Wedel v. Herman*, 59 Cal. 514.) A regard to the policy of the law for the security of titles and the protection of the rights of property which are passed by conveyances, of which the acknowledgments and certificates are a common part, will restrain this court, from allowing such acknowledgments to be impeached by parol evidence, contradicting the facts certified in the fraud and imposition; and where there are fraud and imposition alleged, the

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knowledge of it ought to be brought home to the grantee, or such circumstances within his knowledge of the want of free will and consent on the part of the wife as should lead him to inform himself of the reality of a free execution and acknowledgment by the wife whose property was to, be divested. (Devlin on Deeds, 530; *De Arnaz v. Escandon*, 59 Cal. 486; *Cover v. Manaway*, 115 Pa. St. 338, 2 Am. St. Rep. 552, 8 Atl. 393.) The officer's certificate of acknowledgment, if made in proper form, will prevail over the unsupported testimony of the grantor. (Devlin on Deeds, 529; *Mutual Ins. Co. v. Corey*, 135 N. Y. 326, 31 N. E. 1095; *Lickmon v. Harding*, 65 Ill. 505.)

Allen Miller, T. L. Glenn and E. E. Chalmers, for Respondents.

A married woman's signature to a deed amounts to nothing in anyone's hands as to her until she has acknowledged the deed before a proper officer after privy examination, and he has certified that all the requirements of the statute have been complied with and the deed has been recorded. She ought to have the same right to impeach the certificate of her appearance before the officer making it, when in fact she did not appear before him, that a man has to prove a deed professing to be signed by him to be a forgery. To the same effect are the following cases: *Shelton v. Aultman & Taylor Co.*, 82 Ala. 315, 8 South. 232; *Carr v. Hanley*, 22 Fla. 317; *Lendly v. Smith*, 58 Ill. 250; *Fisher v. Mecater*, 24 Mich. 447; *Smith v. Ward*, 2 Root. (Conn.) 378; *Chamberlain v. Spangler*, 86 N. Y. 603; *Dolph v. Barney*, 5 Or. 205; *Dareis v. Hamblen*, 51 Md. 525; *Borland v. Valcerath*, 33 Iowa, 130; *Bailey v. Landingham*, 53 Iowa, 722, 6 N. W. 76; *Lenoir v. Allen*, 53 Miss. 321; *Donahue v. Mills*, 41 Ark. 421; *Myers v. Gasset*, 38 Ark. 377; *Williamson v. Clarksden*, 36 Ohio St. 664.

SULLIVAN, J.—This suit was brought to foreclose two mortgages, one on real estate and one on personal property, and for the cancellation of a decree of foreclosure and certificate of sheriff's sale thereunder in a suit entitled "Fred. W. Law, as Administrator of the Estate of Hannah B. Humphreys, De-
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ceased, against R. S. Spence and Eliza Spence, Husband and Wife." The complaint contains allegations necessary in a foreclosure action, and attacks said decree of foreclosure and certificate of sale on the grounds that the said defendant Eliza Spence "never appeared before the officer purporting to take her acknowledgment thereto"; "that he never made her acquainted with the contents of said pretended mortgage, separate and apart from, and without the hearing of, her husband," as required by the provisions of section 2956 of the Revised Statutes. The defendants, Spence and wife, filed their disclaimer disclaiming any right, title, or interest in and to the real estate described in the complaint, and default was entered against them. The answer of said administrator put in issue the allegations of the complaint touching the validity of the said Humphreys mortgage. The cause was tried by the court without a jury, and judgment and decree entered in favor of plaintiff, Gray, who is the respondent. This appeal is from the judgment. The main contention is that Mrs. Spence, one of the defendants, who has disclaimed any interest whatever in the real estate described in the complaint, and who failed to answer the complaint further than to file such disclaimer, never appeared before the officer whose signature is attached to said certificate of acknowledgment, and that he did not make her acquainted with the contents of said mortgage, separate and apart from, and without the hearing of, her husband. To establish that issue the plaintiff introduced as witness said R. S. Spence and his wife, Eliza Spence. R. S. Spence testified that he drew up the said Humphreys mortgage; that he was a practicing attorney; that said mortgage was prepared and signed by himself and wife, and the certificate of acknowledgment was made by Mr. Mantonya, the acknowledging officer; that, after the mortgage was signed and acknowledged as appears of record, it was then presented to Mrs. Humphreys. He further testifies that he took the mortgage home to his wife, and that she signed it, and that he then brought it back to Mr. Mantonya; that he acknowledged the execution thereof before said Mantonya, and told him that that was his wife's signature, and he certified to it; that said officer did not go

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to witness' house, to see his wife, at that time, and that his wife did not go before the acknowledging officer before the certificate was made. He testified as follows: "I think I saw him attach his certificate. The mortgage was in my possession from the time my wife signed it until the officer attached his certificate. My wife was at home at that time." On cross-examination he testified that: "Mantonya lived about a stone's throw from us. When Mantonya went home, he went down the street by our house. I don't know whether Mr. Mantonya went and informed my wife of the contents of this instrument, and whether she acknowledged to him that she signed it of her own free will or not, and without my hearing. No, sir; I don't know. Question. And when he certified that he made her acquainted with the contents of this instrument without your hearing, and that she executed this instrument of her own free will and choice, you don't mean to say that that is not true? A No, sir. I don't know. The facts are as I stated them, and that was the common practice in that day." He also testified that the respondent took legal advice as to the validity of the Humphreys mortgage at the time he took the mortgage sought to be foreclosed in this suit. Mrs. Eliza Spence testified on behalf of the plaintiff that she did not appear before Mr. Mantonya, and acknowledge to him that she consented to mortgage her home to Mrs. Humphreys. On cross-examination, she testified as follows: "I signed the mortgage down at my home, at my husband's request. I did it voluntarily. My husband did not coerce or compel me to sign it. Was not compelled by any one to sign it," and, "I was willing to sign it, if my husband wanted it done. It was my free and voluntary act." Mrs. Spence's testimony is to the effect that her acknowledgment was not taken as required by law, while the witness Spence attempts to make it appear that the officer did not take his wife's acknowledgment, but finally testified that he did not know whether the officer took the same or not. We find in the record before us the separate answer of the witness R. S. Spence in the suit of Fred. W. Law, as administrator of the estate of Hannah B. Humphreys, deceased, against R. S. Spence and others, which suit was brought to foreclose the mortgage re-

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ferred to in the testimony of said Spence, above quoted. Said answer was duly verified by the oath of said witness Spence, in which he admits the due execution and delivery of the mortgage in question by himself and his said wife, Eliza Spence. In his testimony in the case at bar he attempts to set forth what was done by himself and wife and the officer in the signing and acknowledgment of said instrument, but he finally stated that he did not know whether the officer taking the acknowledgment (Mr. Mantonya) went and informed his wife of the contents of said mortgage, and whether she acknowledged it as her voluntary act and deed, or not. The testimony of said witness is contradictory, and most unsatisfactory, while the testimony of his wife would indicate that she did not appear before the officer, "and acknowledge to him that she consented to mortgage her home to Mrs. Humphreys." If courts of justice permit mortgages and deeds of real estate to be held void and set at naught on such contradictory and unsatisfactory evidence, given by parties making them, security and permanency to titles to real estate will be a thing of the past. The evidence to impeach a certificate of acknowledgment must be very clear and convincing beyond a reasonable doubt. (*N. W. etc, Bank v. Rauch*, 5 Idaho, 750, 51 Pac. 764.) The evidence in the case at bar is not of the high character required by that rule. The certificate of acknowledgment to the mortgage under consideration is in substantial compliance with the provisions of the statutes in regard to acknowledgments of married women. (Rev. Stats. 1887, sec. 2960.) In this case the woman is not contesting the validity of said mortgage, but a subsequent mortgagee with notice. In the case of *Northwestern etc. Bank v. Rauch*, 5 Idaho, 752, 51 Pac. 764, this court said: "The intent and purpose of the statute are to protect the rights of married women from the dictation or domination of the marital companion. The end sought by the law is not to enable married women, either at the suggestion or dictation of their husbands, to perpetrate a fraud, by seeking to avoid, upon a mere technicality, what was, at the time it was made, a fair and honest transaction, the benefits of which had been received and enjoyed, either directly or indirectly, by the party seeking

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to avoid it." While it is true Spence and wife are not attacking said mortgage directly, their mortgagee is doing so. The fairness of the transaction out of which said mortgage arose is fully shown, Spence having received \$2,500 therefor. Mrs. Spence testified that she signed said mortgage freely and voluntarily, and without any force or coercion on the part of her husband. Said mortgage was drawn by said Spence, and he attended to the execution of it, and delivered it to Mrs. Humphreys. It was regular on its face, and the certificate of acknowledgment thereto was in due form, and certified by I. L. Mantonya, the auditor and recorder of Bear Lake county. To overcome the certificate of acknowledgment under the facts of this case, the evidence must be clear and convincing. The proof of its falsity must be made beyond a reasonable doubt. (*Maxwell Land-Grant Case*, 121 U. S. 381, 7 Sup. Ct. 1015; 1 Devlin on Deeds, sec. 531.) The certificate of acknowledgment, if in proper form, must prevail over the unsupported testimony of the grantor. (1 Devlin on Deeds, sec. 529; *Insurance Co. v. Carey*, 135 N. Y. 326, 31 N. E. 1095; *Lickman v. Harding*, 65 Ill. 505.) Public policy requires that such certificate should prevail over the unsupported testimony of an interested party, otherwise there would be no permanency, and but slight security, in titles to lands. (*Russell v. Theological Union*, 73 Ill. 337.)

Counsel for respondent contends that a married woman ought to have the same right to impeach the certificate of her appearance before the officer making it, when in fact she did not appear before him, that a man has to prove a deed, professing to be signed by him, to be a forgery; and cites a long list of authorities in support of that proposition. This court does not question the correctness of that proposition. We indorse it; but that rule does not apply to the case at bar. The married woman in this case is not attempting to impeach the mortgage in question. If she were, and established its falsity beyond a reasonable doubt, she would be sustained in her contention. In the case at bar the mortgagee of said married woman is attempting to impeach a certificate of acknowledgment that is valid on its face, and has failed to establish its falsity beyond

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a reasonable doubt. Unless this rigid rule be enforced, the officer taking the acknowledgment and certifying to the same would be at the mercy of the unscrupulous grantor, and perhaps liable in damages to any party injured by a certificate held to be false. Counsel for respondent cites *Dye v. Mann*, 10 Mich. 291. In that case the husband executed a mortgage on the homestead, which mortgage the wife did not sign. Thereafter the husband and wife duly executed a mortgage on such homestead, and duly acknowledged the same as required by law. The court held the first-mentioned mortgage void, and the second one valid. In the case of *Fisher v. Meister*, 24 Mich. 447, the court held that a homestead could not be conveyed or mortgaged without the signature of the wife, and that in cases where the wife joins her husband in a conveyance her free separate acknowledgment is necessary. In *Dorsey v. McFarland*, 7 Cal. 342, the husband executed a mortgage on the homestead without his wife joining him. A subsequent mortgage was given, executed by both husband and wife. The former was held void, and the latter valid. The above-cited cases are not in point. In *Le Mesnager v. Hamilton*, 101 Cal. 532, 40 Am. St. Rep. 81, 35 Pac. 1054, suit was brought to foreclose a mortgage alleged to have been executed by defendant Hamilton and wife. The wife answered, denying that she ever appeared before the officer who certified to her acknowledgment. The court held that said certificate was not conclusive, but might be impeached by parol evidence. The decision also holds that the wife need not prove bad faith on the part of the mortgagee, or that he had notice of the falsity of the certificate. In deciding the case at bar it is not necessary for us to decide whether Gray, the respondent, need prove bad faith on the part of Mrs. Humphreys, or that she had notice of the falsity of the certificate of acknowledgment, as the evidence is not sufficient to establish the falsity of said certificate. The Humphreys mortgage and certificate of acknowledgment thereto are valid on their face. The respondent accepted a mortgage from Spence and his wife on the same premises with full knowledge of those facts, and when he brought this suit to foreclose his said mortgage he attacked the validity of said

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Humphreys mortgage, and the judgment and decree foreclosing the same, on the ground that the wife of Spence did not appear before the officer taking said acknowledgment, but failed to establish that fact beyond a reasonable doubt. He therefore must fail in his suit against said judgment and decree.

It is alleged in the complaint, and found by the court, that the sheriff's sale under the foreclosure decree of the Humphreys mortgage took place on the fourteenth day of November, 1897, thus showing that the time for redemption therefrom has long since expired, for which reason the respondent is not entitled to a decree foreclosing his mortgage on the real estate sued on herein. The judgment is modified, and the cause remanded, with instructions to dismiss the action as against the appellant Frederick W. Law, as administrator of the estate of Hannah B. Humphreys, deceased, and to strike out of the decree that part which directs the foreclosure of the plaintiff's real estate mortgage. The judgment appealed from as herein modified is affirmed. Costs of appeal are awarded to appellants.

Huston, C. J., concurs.

Quarles, J., did not sit at the hearing of this case, and took no part in the decision.

ON REHEARING.

(June 10, 1899.)

HUSTON, C. J.—We have examined the petition for a rehearing in this case, and find in it only a reargument of questions which have already been repeatedly decided by this court. Eliminating from the record, as we must do for the reasons set forth in the opinion filed, the testimony of R. S. Spence, the case stands upon the testimony of Mrs. Spence alone, the party whose acknowledgment is sought to be impeached, and the certificate of the acknowledging officer. Under such a condition of the evidence, we find no authority in principle or decisions to warrant us in declaring the acknowledgment void. Rehearing denied.

Sullivan, J., concurs.

Quarles, J., did not sit at the hearing, and took no part in the decision of this case.

Argument for Appellant.

(May 26, 1899.)

CLOW v. REDMAN.

[57 Pac. 437.]

CORPORATION—DISSOLUTION—COPARTNERSHIP.—In an action by a stockholder for the dissolution of a corporation and a distribution of its assets, the court, having found the existence of the corporation as such, the amount of the capital stock, and the amount of the same held by each stockholder, proceeded to distribute a part of the assets in specie among certain of the stockholders, without any finding as to the value of the same, and then decrees a sale of the balance of the property and a distribution of the proceeds of the sale upon the basis of a copartnership. *Held*, error, as not being in conformity with the provisions of section 4330 of the Revised Statutes.

(Syllabus by the court.)

APPEAL from District Court, Bear Lake County.

T. L. Glenn and Allen Miller, for Appellant.

Before the formation of the corporation, the title to the herd of sheep, the other personal property and the lease of the ranch for a term of five years, was in Redman, Beckman and Clow according to the finding of fact. The agreement by them was to transfer the title to the corporation. Clow performed his part of the agreement, and the others intended to do the same. The corporation took possession of the property. This of itself places the title in the corporation. (*Table Mt. Tunnel Co. v. Stranathan*, 20 Cal. 199; *Blodget v. Mining Co.*, 35 Cal. 227; *Town Hall Assn. v. Chester*, 55 Cal. 99.) Section 4330 of the Revised Statutes of Idaho: On application of any creditor of the corporation, or of any member or stockholder thereof, the court may appoint one or more persons to be receivers or trustees of the corporation, to take charge of the estate and effects thereof and to collect the debts and property due and belonging to the corporation, and to pay the outstanding debts thereof, and to divide the moneys and other property that shall remain over among the stockholders or members. The above section of our statute is similar in import and provision to those of our sister states on the same subject, and, so far as we know, no court

Argument for Respondent.

has departed from it. (*Mamma v. Potomac Co.*, 8 Pet. 286; *Homer v. Carter*, 3 McCrary 595, 11 Fed. 362; *Bacon v. Robertson*, 18 How. (U. S.) 418; *Heath v. Baremore*, 50 N. Y. 305; *James v. Woodruff*, 10 Paige, 541; *Burrell v. Bushwick R. R. Co.*, 75 N. Y. 211.) Nor can the stockholder be compelled to take an estimated value of his shares, nor to accept property for them, but has a right to have the value ascertained by actual sale. (Lindley on Partnership, Ewell's ed., 1098, 1099.) Nor does any equity arise out of the fact that Clow agreed, in the bill of sale, to serve the company until its determination by lapse of time and quit before that time expired, for he quit with the consent and approval of the corporation; in other words, the contract was mutually rescinded. (2 Parsons on Contracts, 6th ed., marginal p. 40; Addison on Contracts, Morgan's ed., sec. 897.) His services to the company was not a condition precedent to his right to the stock. (*Chater v. San Francisco Sugar Co.*, 19 Cal. 220.).

John A. Bagley, for Respondent.

The allegations of the complaint do not show a state of affairs to exist that will entitle plaintiff to maintain this action as a stockholder, even if she were one. (Clark on Corporations, sec. 393, 4, 5, and cases cited; *Hawes v. City of Oakland*, 104 U. S. 450; *Dunphy v. Association*, 146 Mass. 495, 16 N. E. 426; *Cogswell v. Bull*, 39 Cal. 320; *Detroit v. Dean*, 106 U. S. 560, 1 Sup. Ct. Rep. 560; *Doud v. Wisconsin etc. Ry. Co.*, 65 Wis. 108, 56 Am. Rep. 620, 25 N. W. 533.) The sentiment thought to be engendered by the allegation that they, the defendants, had appropriated this money to their own use and removed it from the state is checkmated by the allegations of the complaint, showing that the ranch, hay, horses, wagons, sleighs, harness and all property but the sheep and wool were left in the plaintiff's possession until this action was commenced. This property represented much more than all she claims to be entitled to in this case; there was more than her husband contributed and had expended more than one-third of all the property belonging to or ever contributed to the business. The plaintiff cannot maintain this action. (*Whitehouse v. Sprague* (Me.),

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7 Atl. 17; *Abbott v. Merriam*, 8 Cush. 558, 590; *Smith v. Hurd*, 12 Met. 371, 46 Am. Dec. 690.)

HUSTON, C. J.—This is an action by a stockholder to dissolve the corporation, wind up its business, pay its debts, and distribute the remaining fund, if any there be, among the stockholders, in proportion to the shares of stock owned by each stockholder. The appeal is from a portion of the judgment, and the record contains only the judgment-roll. The court finds (seventh finding of fact) “that on the twenty-fourth day of March, 1897, James Redman, Alexander Beckman, Annie Redman, Louisa Beckman, Richard Clow, and the plaintiff organized a corporation under the name of the C. B. R. Sheep Company, with a capital stock of \$6,000, divided into shares of one dollar each, and the parties respectively subscribed for, in the articles of incorporation, one thousand shares of the capital stock, the same being the whole thereof; it being the agreement between the respective parties that the herd of sheep and the other articles of personal property mentioned in these findings of fact should constitute the capital stock of the corporation.” It appears from the record that Richard Clow, James Redman, and Alexander Beckman had been engaged together in the sheep business, as partners, prior to said 24th of March, 1897; that on the organization of the corporation on said last-mentioned date the property theretofore owned by the copartnership, including a lease of a ranch of some three hundred and twenty acres, owned by Richard Clow, was transferred by said parties to the corporation on the tenth day of May, 1897, and on that date the said Richard Clow was elected or appointed president of said corporation, and agreed to give his time, skill, and attention, as president of the corporation, to the management of the business, and to serve it faithfully as herder during the life of the corporation, for which he was to receive thirty dollars per month, payable monthly; that on the fourth day of September, 1897, the said Richard Clow, with the consent and approval of the board of directors, resigned his office of president, quit the management of the company and the employment of herder, and left the state, and about the same time, for a valuable consideration, assigned his

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stock and all his interest in the corporation to the plaintiff; that the plaintiff is the owner of two thousand shares of the capital stock of said corporation, and James Redman, Alexander Beckman, Annie Redman, and Louisa Beckman own, respectively, one thousand shares each; that about the first day of October, 1897, James Redman and Alexander Beckman, who were the only officers of the corporation remaining after Richard Clow resigned the office of president, sold the herd of sheep for the sum of \$5,826.50, and abandoned the corporation and its business; that the season's clip of wool sold for \$1,003.59, all of which moneys Redman and Beckman appropriated to their own use. Upon the institution of this suit, upon the application of the plaintiff, receiver was appointed by the court, to whom the assets of the corporation, including some \$2,000 in money, were turned over. It does not appear that any accounting has ever been had with or made by said receiver, but the court, in its findings of fact, enumerates certain articles of personal property "still on hand and belonging to said corporation," and then proceeds to designate by whom the various articles were furnished to the corporation. In its enumeration of the assets of the corporation no mention is made by the court of the lease for five years of the ranch, executed by Richard Clow to the corporation; but the court finds that "\$4,830.09 of the money of the corporation" is now in the possession of James Redman and Alexander Beckman. As conclusions of law the court finds: "1. The said corporation be dissolved, and the lease executed by Richard Clow, conveying the ranch described in the complaint be canceled, and the possession of the said ranch be delivered back to the said Clow, and that he hold the same as if the said lease had never been made. 2. That the property of said corporation remaining unsold be sold and disposed of, and that the funds and the money arising therefrom, together with all the other funds and moneys of said corporation, be distributed as follows: To James Redman, what he contributed to the capital stock and expenditures; to Alexander Beckman, what he contributed to the capital stock and expenditures; to Linnie Clow, what she and her assignor, Richard Clow, contributed to the capital stock, and expenditures. That the profits, if any, shall be divided equally be-

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tween the three last-mentioned parties; and that each of the said three parties pay the costs of this action, share and share alike." The judgment is as follows: "1. That the corporation defendant, the C. B. R. Sheep Company, be dissolved. 2. That the receiver pay first the costs of this action, including a compensation to himself of thirty-five (35) dollars. 3. That he pay to the plaintiff the amount which she and her assignor contributed to the business, both as capital stock and expenditures, to wit, the sum of \$677, and further sum of \$160.92, being her share of the net profits. 4. That, after the payment of the said two sums to the plaintiff, he pay over the residue in his hands to James Redman and Alexander Beckman, the same, with the moneys already in their possession, being the amount which they contributed in both capital stock and expenditures to the business of the said corporation, together with their share of the net profits; their share being two-thirds thereof. 5. It is further ordered, adjudged, and decreed that said receiver proceed at once to sell and dispose of for cash all the property of said corporation yet remaining unsold, and that he first pay the expenses of the sale, the costs of this action, and his compensation out of the proceeds thereof, and distribute the residue thereof to the plaintiff one-third and the remaining two-thirds to James Redman and Alexander Beckman. Dated this third of September, A. D. 1898. Filed Sept. 3, 1898. D. W. Standrod, Judge." It is from the "third," "fourth," and "fifth" paragraphs of the judgment that this appeal is taken.

In rendering its judgment the district court seems to recognize some binding force in the partnership existing between the parties prior to the organization of the corporation. This is evidenced by the fact that in the order of distribution Annie Redman and Louisa Beckman are ignored entirely. A portion of what constituted the capital stock of the corporation, to wit, the five years lease of the Clow ranch, is given summarily to the plaintiff, without any indication or intimation as to its value, or the value of the use of the ranch during the existence of the corporation. "The capital stock of a corporation is that money or property which is put into a single corporate fund by those who, by subscription therefor, become members of the

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corporate body. That fund becomes the property of the aggregate body only. A share of the capital stock is the right to partake, according to the amount put into the fund, of the surplus profits of the corporation, and ultimately on the dissolution of it, of so much of the fund thus created as remains unimpaired and is not liable for debts of the corporation." (*Burrall v. Railroad Co.*, 75 N. Y. 216.) Counsel for respondents states in his brief that, "as a matter of fact, the court announced from the bench that it held this to be a partnership, and that the business had been conducted under the agreement to form a copartnership, and that the court would treat it as a partnership in rendering its decision, and fixing the property rights of the respective parties," But in its "ninth" finding of fact the court finds: "That the C. B. R. Sheep Company was and is a corporation, both *de jure* and *de facto*, and was such from the twenty-fourth day of March, 1897; and it was the intention of said parties, and each of them, at the time of the organization of the corporation, to transfer the property in these findings described to the said corporation, so as to place the title of the same in it." We think the findings of the court hardly agree with the statement of counsel in his brief, though, "as a matter of fact," both may be true. Still this court must be governed by the findings of fact as they appear in the record. It is not the province of this court, upon the record before us, to pass upon the honesty or fairness of the distribution of the assets of the corporation as made, but to decide whether such distribution has been directed as required by law. We do not think that the law contemplates that the court may portion out certain of the assets of a corporation arbitrarily among the stockholders, without reference to value, and then order a sale of the balance. We think the "fifth" paragraph of the judgment should be made applicable to all the assets of the corporation, except the moneys on hand, including the lease of the Clow ranch for five years; and that, when so sold, the proceeds of such sale should be distributed among the stockholders according to the amount of stock held by each. It might be that the remainder of the lease would be of more value than all the personal property and money owned

Points decided.

by the corporation. In that case it would be manifestly unjust that the plaintiff should be awarded the remainder of it. "Where lands are conveyed absolutely to a corporation having stockholders, no reversion or possibility of a reverter remains in the grantor" (*Heath v. Barmore*, 50 N. Y. 305), and we apprehend the same rule would apply to the case of a lease of lands to a corporation for a term of years. While the court finds that the C. B. R. Sheep Company was and is a corporation, and proceeds to declare a dissolution of the same, in its judgment it treats said defendant corporation as a mere co-partnership. This is not the action contemplated by section 4330 of the Revised Statutes, which defines the rights of stockholders in a corporation in case of a dissolution. There was no motion for a new trial in this case, and, the appeal being from a part of the judgment only, the case is remanded to the district court, with directions to modify the judgment in accordance with the views herein expressed. Costs to appellant.

Quarles and Sullivan, JJ., concur.

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(May 26, 1899.)

BRANSTETTER v. WILLIAMS.

[57 Pac. 433.]

MINING DITCHES—APPROPRIATION OF WATER FOR MINING PURPOSES—

PRIORITY.—Plaintiffs' predecessors in interest located and appropriated one hundred and twenty-five inches of the waters of Elk creek, in 1863, and utilized the same for purposes of placer mining. In December, 1863, the predecessors in interest of defendants located and appropriated all the surplus or available water in Elk creek and tributaries (Deer creek included), and used the same for mining purposes through a ditch constructed during 1864. During the year 1865, plaintiffs' predecessors constructed another ditch, with a capacity of five hundred inches of water, and connected the same with the first-named ditch by a flume across Elk creek, and also enlarged the first-mentioned ditch to a capacity of five hundred inches. *Held*, that, as against defendants, plaintiffs could only claim priority for one hundred and twenty-five inches of the water of Elk creek. The finding of the

Argument for Appellants.

lower court against the claim of appellants for damages held to be sustained by the evidence.

(Syllabus by the court.)

APPEAL from District Court, Boise County.

Hawley & Puckett, for Appellants.

Declarations of the grantor are admissible, not only as against himself, but against parties claiming under him. The subsequent claimants are considered as standing in his place and as having taken the *title cum onere*, subject to the same charges and restrictions which attached to it in his hands. It matters not whether the declarations relate to the limits of the party's own premises, or to the extent of his neighbor's, or to the boundary line between them, or to the nature of the title he asserts. If their purpose is to restrict his own premises or lessen his own title, they are admissible. (*Stanley v. Green*, 12 Cal. 148; *McFadden v. Wallace*, 38 Cal. 51; *McFadden v. Ellmaker*, 52 Cal. 378.) Declarations of a former owner of land are admissible against those claiming under him by subsequent title. (*Padgett v. Lawrence*, 10 Paige, 170, 40 Am. Dec. 232; *Harrington v. Slade*, 23 Barb. 165; *Vrooman v. King*, 36 N. Y. 482; *Chadwick v. Fonner*, 6 Hun, 545; *Riddle v. Dixon*, 2 Pa. St. 372, 44 Am. Dec. 207; *Fickett v. Swift*, 41 Me. 65, 66 Am. Dec. 214; *Maxwell v. Harrison*, 8 Ga. 61, 52 Am. Dec. 385.) A right to the use of water may be acquired by an exclusive and uninterrupted enjoyment of the water in a particular way to a period corresponding to the time fixed by the statute of limitations as a bar to an entry on land. (*Crandell v. Woods*, 8 Cal. 136; *Union Water Co. v. Crary*, 25 Cal. 504, 85 Am. Dec. 145; *American Co. v. Bradford*, 27 Cal. 360; *Los Angeles v. Baldwin*, 53 Cal. 469.) If one goes upon the public land of the United States and appropriates water for a lawful purpose, and is permitted to continue its adverse enjoyment and use for more than ten years, such appropriation ripens into a title which cannot be disturbed by one succeeding to the rights of the United States. (*Tolman v. Casey*, 15 Or. 83, 13 Pac. 669.) The right acquired by prescription is measured by the right enjoyed; it is always confined to the right as

Argument for Respondents.

exercised for the full period of time prescribed by the statute. (*Boynnton v. Longley*, 19 Nev. 69, 3 Am. St. Rep. 781, 6 Pac. 437.) But our right here has been exercised during all these years to the full carrying capacity of our ditch, five hundred inches, whenever the supply of water in Elk creek was sufficient to fill it. Appellants have clearly shown that their use of the water was open, peaceable, uninterrupted, and under color and claim of right, and having so shown their right at this late day cannot be disputed or disproved. (*Union etc. Co. v. Dangberg*, 2 Saw. 450, Fed. Cas. No. 14,370; *Mining Debris Case*, 9 Saw. 441, 18 Fed. 753; *Winter v. Winter*, 8 Nev. 129; *Ledu v. Jim Yet Wa*, 67 Cal. 346, 7 Pac. 731; *Cave v. Crafts*, 53 Cal. 135; *Gallaher v. Montecito etc. Co.*, 101 Cal. 242, 35 Pac. 770; *Grigsby v. Clear Lake etc. Co.*, 40 Cal. 396; *Evans v. Ross* (Cal.), 8 Pac. 88; *Cox v. Clough*, 70 Cal. 345, 11 Pac. 732.)

W. E. Borah and George Ainslie, for Respondents.

All matters which we have been discussing are questions of fact. And we might have contented ourselves with calling attention to the well-established rule, that where there is evidence to sustain the decision, or where there is a conflict of evidence, the decision of the lower court will not be disturbed. These are all matters upon which the court found, and being matters, too, upon which there was a conflict of testimony, the decision of the lower court is conclusive. (*Sears v. Flodstrom*, 5 Idaho, 313; 49 Pac. 11; *Murphy v. Montandon*, 4 Idaho, 320, 39 Pac. 195; *Commercial Bank v. Lieuallen*, 5 Idaho, 47, 46 Pac. 1020; *Spaulding v. Coeur D'Alene Co.*, 5 Idaho, 528, 51 Pac. 408.) If the plaintiffs were prior appropriators, and if we have acquiesced in their prior appropriation, certainly there could be no title acquired by adverse use. (*Union etc. Co. v. Ferris*, 2 Saw. 176, Fed. Cas. No. 14,371, 2 Saw. 450, Fed. Cas. No. 14,370; *Dick v. Bird*, 14 Nev. 167; *Grigsby v. Water Co.*, 40 Cal. 396; *Anaheim Water Co. v. Water Co.*, 64 Cal. 185, 30 Pac. 623; *Boyton v. Water Co.*, 40 Cal. 316.) The party claiming by prescription must show affirmatively that his use injured the party against whom he claimed to have acquired title; that is, took a part of his water when he needed it. (*Lakeside Ditch Co. v. Crane*, 80

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Cal. 181, 22 Pac. 76; *Hanson v. McCue*, 42 Cal. 310, 10 Am. Rep. 299.) It is not enough that a party prove possession for the statutory period. He must show an adverse or hostile holding. This, we understand, is not contended for in this case. (*Kinney on Irrigation*, secs. 294, 295; *Alta Land Co. v. Hancock*, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645.) The use of water by permission of the owner cannot be adverse use or ripen into a prescriptive right. (*Felz v. City of Los Angeles*, 58 Cal. 74; *Anaheim Water Co. v. Water Co.*, 64 Cal. 185, 30 Pac. 623.)

HUSTON, C. J.—This action is brought by the plaintiffs to enjoin the use by defendants of certain waters of Elk creek, and for damages alleged to have been sustained by plaintiff by reason of the wrongful acts of defendants in the use of such waters. The case was tried before the court without a jury, and judgment rendered for the defendants, from which judgment, and from the order overruling a motion for a new trial, this appeal is taken.

While there are some exceptions to the admission of evidence, appellants rely mainly upon the contention that the findings are not supported by the evidence, and that the court failed to make findings upon several material issues. We do not think the latter claim is sustained by the record, and, while the evidence is conflicting, we are of the opinion that the conclusions of the court are sustained by the evidence. The facts, as they appear from the record, and as they are found by the court, are substantially as follows: "That in 1863, the plaintiff's grantors and predecessors in interest appropriated one hundred and twenty-five inches of water, measured under a four-inch pressure, of the waters of that certain stream in Boise county, state (then territory) of Idaho, known as 'Elk creek'; said appropriation being made at a point about four miles above the town of Idaho City, in said county. That immediately after said appropriation, plaintiff's grantors and predecessors in interest built a ditch, commonly known as the 'Tibbits ditch,' for the purpose of conveying said waters from said point of location and diversion, and in due time applied said water to a beneficial use, to wit, the use of placer mining, said ditch having a carrying cap-

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acity of one hundred and twenty-five inches, of water measured under a four-inch pressure." "That during the late fall and winter of 1865 and spring of 1866, the predecessors in interest of plaintiffs constructed the Dunn ditch proper, now owned by plaintiffs, and connected the same by a flume across Elk creek with said Tibbits ditch, and over a portion of the same, and enlarged the said portion of the Tibbits ditch so as to make the Dunn ditch carry five hundred inches of water under a four-inch pressure." "That in December, 1863, the predecessors in interest of the defendants located the water right and ditch now owned by defendants, and then known as the 'Summit ditch,' and afterward as the 'Channell ditch,' which ditch was constructed during the winter of 1863 and the year 1864, and that said ditch was constructed with a capacity of about four hundred inches of water under a four-inch pressure; and the waters of Elk creek were diverted and appropriated by means of said ditch in the year 1864; for mining purposes, by defendants' predecessors in interest, and the defendants are now the owners and in possession of said Channell ditch." These findings—and they are fully supported by the evidence; in fact, there is really no contention as to them—would seem to settle the question of priority between plaintiffs and defendants; but the plaintiffs seek to overcome their inevitable effect by showing that the predecessors in interest of the defendants have, at some time in the past, recognized a priority of right in the plaintiffs to the use of the waters in question. Of course, evidence of this kind is largely reminiscent; but we think, taking all of the evidence together, the conclusion reached by the court was correct.

Upon the question of damages we think the preponderance of evidence is largely with the defendants. The claims being worked by the defendants are located some five miles from the head of plaintiffs' ditch, and at an altitude higher than the head of plaintiffs' ditch. The water used by defendants, after such use, is turned into Wolfe creek, and reaches the main channel of Elk creek at a point about a mile above the head of plaintiffs' ditch. The bed of Wolfe creek, through which the water flows for several miles before entering Elk creek, is, to considerable extent, covered with a heavy growth of underbrush

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and the bed of Wolfe creek is flat and open for some distance immediately below the mouth of defendant's ditch. It is hardly probable that any serious damage would result to plaintiffs from the mining operations of defendants. In fact, the evidence upon this question on the part of plaintiffs is so meager and inconclusive as to scarcely raise a presumption.

Plaintiffs claim in their complaint that defendants are insolvent, and unable to respond in damages, as an additional ground for injunction; but, as no proof was offered in support of the allegation, and nothing is said in the brief of counsel or in oral argument upon the point, we assume it to have been abandoned.

We might rest the decision in this case upon the fact that, the evidence being conflicting, the findings of the lower court will not be disturbed; but a careful examination of the record satisfies us that the findings are fully sustained by the evidence. We have examined the record with much care touching appellants' claim, of adverse user, but we are unable to agree with this contention. It seems to us such a contention is at variance, not only with the allegations of appellants' complaint, but of the whole theory of their case. Appellants allege in the ninth paragraph of their complaint that defendants' predecessors in interest have for a period of twenty years last past always recognized and admitted the superior rights of plaintiffs and their predecessors in interest in and to the waters of said Elk creek. This is scarcely consistent with appellants' claim of adverse user.

It was not necessary or material, under the issues in this case, for the court to determine the amount of water to which the defendants are entitled. The findings cover all the material issues in the case, and are supported by the evidence. The judgment of the district court is affirmed, with costs to respondents.

Quarles and Sullivan, JJ., concur.

Argument for Appellants.

(May 26, 1899.)

BRANSTETTER v. MANN.

[57 Pac. 433.]

TRUST—EVIDENCE.—One who takes title to real estate, purchased with funds of another, and for the benefit of the latter, holds as trustee, and parol evidence is admissible to establish such trust.

(Syllabus by the court.)

APPEAL from District Court, Boise County.

Hawley & Puckett, for Appellants.

Trusts, considered with reference to their creation or inception, are either express or implied. To create an express trust, words evincing the intention to create the trust must be used; while implied trusts are such as arise by implication of law, or are presumed without an express declaration in order to prevent fraud and satisfy the demands of justice. Resulting and constructive trusts are necessarily implied trusts. (27 Am. & Eng. Ency. of Law, 6, and notes; 10 Am. & Eng. Ency. of Law, 2.) A mere parol agreement, declaration or voluntary conveyance, will not create an implied trust; nor will payment of money or other transaction subsequent to the time of the conveyance. (10 Am. & Eng. Ency. of Law, 12; *Walter's Appeal* (Pa. St.), 8 Atl. 406; *Olcutt v. Bynum*, 17 Wall. 44; *Bailey v. Hemenway*, 147 Mass. 326, 17 N. E. 645, 6 New Eng. Rep. 613; *Lehman v. Lewis*, 62 Ala. 129; *Never v. Crane*, 98 N. Y. 40; *Boyer v. Floury*, 80 Ga. 312, 5 S. E. 63.) But if our contention in this regard is wrong, still the decree cannot be sustained, even where parol evidence is admissible to establish a trust; such evidence must be clear and satisfactory, and, when one of the parties is dead, should be unequivocal and free from doubt. (*Trout v. Trout*, 44 Iowa, 471; *Morse v. Graves*, 23 Iowa, 597; *Childs v. Griswold*, 19 Iowa, 362.) The supreme court of Missouri has gone further in this regard even than the above, and in *Rogers v. Rogers*, 87 Mo. 257, say that in order to establish a trust in lands by parol, the evidence must be so cogent as to leave no room for reasonable

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doubt in the mind of the chancellor. To the same effect are *Forrester v. Scoville*, 51 Mo. 268; *Rengo v. Richardson*, 53 Mo. 385; *Kennedy v. Kennedy*, 57 Mo. 73; *Johnson v. Quarles*, 46 Mo. 423. The burden rests heavily upon the person seeking to enforce the trust to establish it. (*Whitmore v. Leonard*, 70 Mo. 276; *Lehman v. Lewis*, 62 Ala. 129.) In this case, if a trust was even in existence it was extinguished by the deeds given by Nobel. (*Carter v. Hopkins*, 79 Cal. 82, 21 Pac. 549.) An absolute conveyance of lands cannot, after its execution, be turned into a trust by any subsequent oral declarations of the parties thereto. (*Sherman v. Sandell*, 106 Cal. 373, 39 Pac. 797.)

George Ainslie, for Respondents.

As to the resulting trusts it is held that: "If land is purchased in the name of one person, but the consideration is paid by another, such land, though conveyed to the former, will be held by him in trust for the latter. (10 Am. & Eng. Ency. of Law, 8, 9, 11, 12, 25, 26, and notes, and cases cited.) Intention is an essential element in a resulting trust, and, though not expressed in words, the law presumes the intent from the facts and circumstances accompanying the transaction, and the payment of the consideration for the whole, or a definite or aliquot part of the property sought to be impressed with the trust. Equity, in enforcing a constructive trust, can follow the real owner's property, and preserve his ownership into whatever form it may be changed or transmitted—even into the hands of third parties, so long as the property or fund into which it has been converted can be traced, until it goes into the hands of an innocent purchaser for value, and without notice. The rule applies to both real and personal property. (*Farmers' etc. Bank v. Kimball etc. Co.*, 1 S. Dak. 388, 36 Am. St. Rep. 739, 47 N. W. 402 et sep.; *McCahill v. McCahill*, 64 N. Y. St. Rep. 255, 32 N. Y. Supp. 836; *Woodside v. Hewel*, 109 Cal. 481, 485, 42 Pac. 152; *Beck v. Uhrich*, 13 Pa. St. 636, 53 Am. Dec. 507, and notes; 1 Greenleaf on Evidence, sec. 266; Idaho Rev. Stats., secs. 6007, 6008.) When the legal title to land has been acquired in pursuance of a verbal agreement to hold the same in trust, etc., a

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trust is created by operation of law. (*Von Trotha v. Bamberger*, 15 Colo. 1, 24 Pac. 883; *Butte H. Co. v. Cobban*, 13 Mont. 351, 34 Pac. 24; *O'Connor v. Irvine*, 74 Cal. 435, 16 Pac. 236; *Robarts v. Haley*, 65 Cal. 397, 4 Pac. 385; *Riley v. Martinelli*, 97 Cal. 575, 33 Am. St. Rep. 209, 32 Pac. 579; *Boyd v. McLean*, 1 N. Y. Ch. Rep. 254, 255, 1 Johns. Ch. 582, and notes.) And such trust may be proved by parol, it not being within the statute of frauds. (*Boyd v. McLean*, 1 Johns. Ch. 582, 1 N. Y. Ch. Rep. 254-255, and notes; *Berry v. Wiedeman*, 40 W. Va. 36, 52 Am. St. Rep. 866, 20 S. E. 817; *Botsford v. Burr*, 1 N. Y. Ch. Rep. 426-428, and notes, 2 Johns. Ch. 405 et seq.) If a *cestui que trust* pays only a part of the purchase money there will be a resulting trust in his favor *pro tanto*. (*Botsford v. Burr*, *supra*, p. 428, and notes, citing *Voorhees v. Presbyterian Church of Amsterdam*, 8 Barb. 145; S. C., 5 How. Pr. 68; *Ross v. Hegeman*, 6 N. Y. Ch. Rep. 434, 2 Edw. Ch. 373; *Astreen v. Flanigan, etc.*, 6 N. Y. Ch. Rep. 656, 3 Edw. Ch. 279, 280, and notes; *Getman v. Getman*, 5 N. Y. Ch. Rep. 472, 1 Barb. Ch. 500; *Kane v. Bloodgood*, 2 N. Y. Ch. Rep. 231, 7 Johns. Ch. 90, 91, and notes, 11 Am. Dec. 417; *Riley v. Martinelli*, 97 Cal. 575, 33 Am. St. Rep. 209, 32 Pac. 579; 10 Am. & Eng. Ency. of Law, 15, 16, 25, 26, and notes.) Independent of these authorities, respondents, with due deference to counsel for appellants, respectfully state that, under the evidence, plaintiffs, under their amended complaint, could not have a judgment in their favor sustained. There would be a fatal variance, or failure of proof, rather, as it has been universally determined that the *allegata* and *probata* must correspond. (*Tomlinson v. Monroe*, 41 Cal. 94; *Evans v. Bailey*, 66 Cal. 112, 4 Pac. 1089, 4 West Coast Rep. 427; *Smith v. Frost*, 70 N. Y. 65; *Johnson v. Moss*, 45 Cal. 515, and numerous other authorities.)

QUARLES, J.—The plaintiffs claim to own an undivided one-half interest in and to a certain ditch known as the "Carmody ditch," conveying two hundred and fifty inches of water, with a like interest in the water right appurtenant thereto, and plaintiffs assert that the other half of said ditch and water right is owned by the defendants. Plaintiffs aver that by

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mutual consent the defendants took and had the sole use and possession of said ditch and water right during the mining season of 1894, as bailees of plaintiffs, and that the rents, issues and profits resulting from rental and sale of waters therefrom during said season was the sum of \$1,460 over and above the expense of caring for and maintaining said ditch and water right, which sum, the plaintiffs allege, has not been accounted for by the defendants to the plaintiffs. This suit was brought by the plaintiffs to recover one-half of said sum, to wit, the sum of \$730. The answer specifically denied the allegations of the complaint, and affirmatively alleged ownership in the defendants to an undivided three-fourths of said ditch and water right and alleged other affirmative matter in defense of plaintiffs' action. The cause was tried by the court without a jury, and findings of fact made and judgment rendered in favor of the defendants. Plaintiffs moved for a new trial, which was denied, whereupon they appealed from the judgment and from the order denying a new trial. The errors relied upon by the appellants for a reversal are: 1. That the finding that the defendants own three-fourths of the ditch and water right is not supported by the evidence; 2. That plaintiffs were entitled to the judgment demanded, and the judgment for the defendants is not supported by the evidence; 3. Appellants also specify eight errors in allowing certain evidence to be introduced.

We find in the record a conflict of evidence upon the material issues, and do not feel justified or authorized to disturb any of the findings. It is alleged in the answer, and found as facts by the court, that the interest in dispute in the ditch in question (an undivided one-half) was purchased by one W. B. Noble (one-half thereof for plaintiffs, and the other one-half for the predecessors of the defendants) in 1877, and the deed therefor taken in the name of W. B. Noble; that one-half of the purchase price therefor was advanced to said Noble by the predecessors of the defendants, and used by said Noble in paying for said interest in the ditch, the said Noble agreeing to hold one-half of said interest for the predecessors of defendants; and that for more than ten years prior to the commencement of this action the defendants have been in the possession

Points decided.

of said ditch and water right, holding and claiming three-fourths thereof for themselves and one-fourth thereof for the plaintiffs.

The remaining errors assigned by the appellants are to the rulings made by the trial court in admitting parol testimony to show the resulting trust under the Noble deed to the predecessors of the defendants. Such evidence was admissible, and not prohibited by our statute of frauds. One who takes the title to real estate purchased with funds of another, and for the benefit of the latter, holds as trustee, and parol evidence is admissible to establish such trust. In this case it appears that Noble, the trustee, afterward, by deed, conveyed the entire interest held by him as such trustee to plaintiffs; but the position of plaintiffs is not improved by such subsequent deed, as they knew the circumstances under which Noble held, and are charged with notice of the trust. Finding no reversible error in the record, the order denying a new trial and the judgment appealed from are affirmed, with costs to respondents.

Huston, C. J., and Sullivan, J., concur.

(May 26, 1899.)

STATE v. POTTER.

[57 Pac. 431.]

CRIMINAL PRACTICE—EVIDENCE—DEPOSITIONS ON PRELIMINARY EXAMINATIONS.—The admission as evidence, upon the trial of a person charged with a criminal offense, of the depositions of witnesses taken on the preliminary examination of such person upon such charge is not permissible under the statutes of Idaho. The Penal Code having prescribed the cases in which depositions taken on preliminary examinations may be used, the court is not authorized to extend the rule to cases other than so prescribed by statute.

(Syllabus by the court.)

APPEAL from District Court, Nez Perces County.

S. L. McFarland and George W. Tannahill, for Appellant.

Argument for Appellant.

The court committed a serious error in admitting in evidence over defendant's objection, an alleged deposition of one M. Wells. The deposition was not shown to have been taken in the preliminary examination of defendant upon said charge or in any other judicial proceeding and so far as appears upon its face it may have been taken *ex parte*. It was not certified or authenticated as required by law and was clearly inadmissible. (Idaho Rev. Stats., sec. 7576; *State v. Braithwaite*, 3 Idaho, 119, 27 Pac. 731; *Williams v. Chadbourne*, 6 Cal. 559; *People v. Morine*, 54 Cal. 575; *People v. Ward*, 105 Cal. 652, 39 Pac. 33; *People v. Bojorquez*, 55 Cal. 463; *Pooler v. State*, 97 Wis. 627, 73 N. W. 336; *State v. Lee*, 13 Mont. 248, 33 Pac. 690; *People v. Chung Ah Chue*, 57 Cal. 567.) A deposition not certified by the magistrate otherwise than by a jurat in the ordinary form is not admissible. (*People v. Qurise*, 59 Cal. 343; *People v. Gardner*, 98 Cal. 127, 32 Pac. 880; *People v. Mitchell*, 64 Cal. 85, 27 Pac. 862; *People v. Cunningham*, 66 Cal. 668, 4 Pac. 1144, 6 Pac. 700, 846.) Had it been duly certified and authenticated it was inadmissible for the reason that no proper foundation had been laid or shown for its admission. (Idaho Rev. Stats., sec. 8170; *State v. Cleary*, 40 Kan. 287, 19 Pac. 776; *State v. Hunsaker*, 16 Or. 497, 19 Pac. 605; *People v. Lee Sare Bo*, 72 Cal. 623, 14 Pac. 310.) The deposition of one R. E. Goodwin was admitted and read in evidence over defendant's objection. The deposition of defendant read in evidence was more objectionable than either of the others. In fact, only a few extracts of what was alleged as his deposition were read to the jury. It was not identified or attempted to be identified in any manner, and, for aught that appears to the contrary, may have been taken *ex parte* and even in a matter or proceeding entirely foreign to the charge. It is needless to add that the admission of this matter was prejudicial to defendant, for its purpose and effect is seen at a glance. (*People v. Hawley*, 111 Cal. 78, 43 Pac. 404; *State v. Cleary*, 40 Kan. 287, 19 Pac. 776; *State v. Hunsaker*, 16 Or. 497, 19 Pac. 605; *State v. Stevens*, 29 Or. 85, 43 Pac. 947; *State v. Pugh*, 16 Mont. 343, 40 Pac. 861; *People v. Chung Ah Chue*, 57 Cal. 567.)

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S. H. Hays, Attorney General, and James W. Reid, for Respondent.

In regard to the depositions which were taken before the magistrate and introduced on the trial, defendant objecting to them for informality, we call the attention of the court to the fact that the depositions were shown to have been taken at the preliminary hearing in this case and after correction where admitted in evidence. As printed in the transcript they are not corrected as to the certificate, as the records show they should be. As corrected they were entitled to be admitted. It will be noticed that they were only introduced in evidence after the correction was directed by the trial court. A proper foundation was laid for the introduction of the depositions. (*People v. Riley*, 75 Cal. 98 (101), 16 Pac. 544; *People v. Nelson*, 85 Cal. 421 (426), 24 Pac. 1006; *People v. Ressel*, 2 Hill, 289; *State v. Johnson*, 12 Nev. 121; *People v. Oiler*, 66 Cal. 101, 4 Pac. 1066; 1 Bishop's Criminal Procedure, sec. 1194.)

HUSTON, C. J.—The defendant was convicted of assault with intent to commit rape, and from the judgment of conviction and the order denying defendant's motion for a new trial this appeal is taken. Appellant assigns several errors in the admission of evidence, but we do not think the rulings of the trial court thereon were erroneous, or, if erroneous, that they could have been in any way prejudicial to the defendant.

The prosecution offered in evidence certain depositions taken upon the preliminary examination of defendant before the magistrate, which were objected to by defendant, upon the ground that they were not taken and certified as required by section 7576 of the Revised Statutes. These depositions are set forth in the record. There is nothing to indicate that they were taken on a preliminary examination of the defendant, and to one of them—the deposition of M. Wells—there is no certificate, except the jurat in the ordinary form. The court permitted the justice of the peace to add certificates to the depositions after they were offered in evidence. There does not appear to have been anything that could be called diligence

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manifested on the part of the state in endeavoring to procure the attendance of either of the witnesses.

The objection on the part of the defendant to the introduction of the depositions taken at the preliminary examination of the defendant, upon the trial in the district court, raises a very important question, and one which requires, and has received, much and careful investigation at the hands of the court. The first question that confronts us is, Are depositions of witnesses, taken upon the preliminary examination of the person charged with a criminal offense, admissible as evidence against such person upon his trial for the offense? It seems to be conceded by both parties in this case that they are; but we find no authority for the admission in the statutes of Idaho. The use by the grand jury of the depositions of witnesses taken upon a preliminary examination has been recognized by statute ever since the act of the first session of the territorial legislature, but we find no statute of either the territory or state permitting or authorizing the use of such depositions on the trial. The Revised Statutes, title 10, chapter 4, provides for the taking of depositions of witnesses on the part of the defendant, and also provides that the depositions so taken "may be read by either party on the trial, upon its appearing that the witness is unable to attend by reason of his death, insanity, sickness or infirmity or his continued absence from the territory [state]." It is further provided (Rev. Stats., tit. 10, c. 5, sec. 8176): "When an issue of fact is joined upon an indictment, the defendant may have any material witness residing out of the territory [state] examined in his behalf as prescribed in this chapter and not otherwise." Section 8189 provides that the depositions so taken "may be read by either party on the trial, upon it being shown that the witness is unable to attend from any cause whatever"; but there is no provision of our Revised Statutes permitting the use of the depositions taken on a preliminary examination to be used against the defendant upon his trial. The legislature seemed to consider it necessary to authorize by statute the taking of depositions on the part of the defendant, to be read on the trial. Without the aid of such a statute, would it be

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contended that depositions on the part of the defendant could be read in evidence on the trial? If it required a statute to authorize the admission of depositions in favor of the defendant, it certainly would not be contended that depositions against him should be received without equal authority. It is true that the framers of our constitution saw fit to omit from that instrument the usual provision which obtains in not only the federal constitution, but in that of most of the states, providing that in all criminal prosecutions the defendants shall be confronted with the witnesses against him. Doubtless this omission was made advisedly, and the effect was to leave the matter with the legislature. The legislature has acted upon the question, and has prescribed how and to what extent depositions taken on the preliminary examination of a defendant upon a criminal charge may be used, and we do not think it is the province of the court to extend the rule. It is true the practice of admitting depositions taken at the preliminary examination to be read in evidence on the trial has obtained in both the territory and state for a long time, and has even received the sanction of the supreme court of the territory (*Territory v. Evans*, 2 Idaho, 651, 23 Pac. 232); but a practice which wants the authority of law, and which is in derogation of a recognized elementary right of the citizen, should gain no sanctity by user.

Our natural repugnance to overruling a decision of our honorable predecessors is modified somewhat by the reflection that the court in that case (*Territory v. Evans*, *supra*) does not seem to be inspired with that unfaltering confidence in the correctness of its conclusions which is so assuring in the decisions of courts of last resort. In that case, the court says: "Had the depositions been improperly admitted, the appellant has failed to furnish the court such a record as will authorize it to correct the error"; and then adds, after citing section 8236 of the Revised Statutes: "The appellant has entirely failed to show us he was prejudiced in the least by the alleged error of permitting the use of the depositions." We have examined with care the cases cited in the case of *Territory v. Evans*, and, while they support that decision, we are unable to

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agree with either the reasons urged or the conclusion reached. We fail to recognize the potency of the argument upon which these decisions largely depend, that the constitutional requirement has been met by the defendant having been "confronted with the witnesses against him" upon the preliminary examination. When we recall, as every lawyer who has any extended experience in criminal law practice may do, how very perfunctory these preliminary examinations are, not only on the part of the prosecution, but more frequently, of necessity, on the part of the defendant, the uncharitableness of the rule is apparent. It is always the policy of the prosecution, on preliminary examinations, to only carry its investigations to the extent necessary to secure the holding of the defendant; and it is seldom that the defendant feels warranted in going fully into his defense upon a preliminary examination before a court, where it is only required that it shall be made to appear that the offense named has been committed, "and that there is sufficient cause to believe the defendant to have been guilty thereof." To say that the exigency of that rule of universal recognition among people of the Anglo-Saxon race, and in this country, may almost be said to be an inalienable right, which requires that a person charged with the commission of a criminal offense shall be confronted with his accusers, is met by such a tentative proceeding as a preliminary examination usually is, seems to us "keeping the word of promise to the ear and breaking it to the hopes." It smacks too much of the methods in the Dreyfus case. An examination of the record in this case shows the evidence to be conflicting, and, but for the errors in law referred to, we would not feel warranted in reversing the judgment. We consider the permitting the depositions taken on the preliminary examination of the defendant to be read on the trial was prejudicial error, and for this reason the judgment of the district court is reversed, and the cause remanded for further proceeding in accordance with this opinion.

Quarles and Sullivan, JJ., concur.

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(May 26, 1899.)

PROUT v. MOUNCE.

[57 Pac. 307.]

REHEARING—INTERLOCUTORY ORDERS.—A petition for rehearing will not lie in case of preliminary or interlocutory orders, made by the supreme court. It is only in case of a final decision that petitions for rehearing will be considered.

(Syllabus by the court.)

Original proceeding in Supreme Court.

Eugene O'Neill, for Petitioner.

Plaintiffs by their counsel were entitled to notice of the petition or motion asking this court for the order which they have obtained without notice. (Rev. Stats., secs. 4882, 4892-4894.) Certainly in this case no order, if any, should be made that can be construed into anything more than an authorization to settle the statement leaving with the lower court all discretionary powers arising from the delays of defendants and the conditions of the case. (Hayne on New Trial and Appeal, sec. 165; *Boggs v. Clark*, 37 Cal. 236 (less than two months); *Chabot v. Tucker*, 39 Cal. 434; *Hopkins v. Western Pac. R. R. Co.*, 44 Cal. 389.)

James W. Reid, for Defendants, files no brief.

QUARLES, J.—The defendants presented to this court, April 19, 1899, a petition, duly verified by the oath of James W. Reid, in which the following allegations are made, to wit:

"1. That he is the attorney of Eva K. Mounce et al., in a certain action which has long since been pressed to judgment in the district court of the second judicial district in and for the county of Nez Perces and state of Idaho, wherein Mary A. Prout et al. are plaintiffs and Eva K. Mounce et al. are defendants. 2. That in said cause judgment has been heretofore rendered in favor of plaintiffs, and against the defendants, such judgment having been rendered on or about the — day of —, 189—. 3. That thereafter, and after the

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rendition of said judgment, your petitioner, as the attorney for Eva K. Mounce et al., being desirous of appealing from such judgment and decree, caused to be prepared and served, within the time allowed by the original agreement between counsel for the respective parties in said cause, and the extensions thereof, and caused such bill of exceptions and settlement of the cause to be served upon the counsel for the different parties, who has drafted and presented his objections thereto. 4. That upon several and divers and sundry occasions your petitioner has asked to have the said bill of exceptions, together with the prepared amendments thereto, heard, determined, settled, and allowed, and has had several times and dates fixed for the settlement and allowance thereof, all of which were so fixed by the judge of the district court of the second judicial district in and for the state of Idaho, and that at each such times, for some reason beyond the control of your petitioner, the said bill of exceptions, with the prepared amendments, has been deferred; that the judge who tried said cause is W. G. Piper, formerly judge of the district court of the second judicial district of the state of Idaho; that the term of office of the said W. G. Piper has expired, and that your petitioner is informed, and so states, that the said W. G. Piper has removed, or is about to remove, from the state of Idaho, and has been absent from the state of Idaho for quite a number of weeks last past; that he at present is at Moscow, Latah county, Idaho, his former residence in this state, but is practically unable to attend to any business whatever, on account of indisposition and sickness. 5. That your petitioner is further informed and so states that the said W. G. Piper, judge who tried said cause, will not himself fix any definite time for the settlement and allowance of said bill of exceptions, and that the same has now been pending before the said judge, both before and since the expiration of his term of office, for many months. Your petitioner further states that unless this court will make an order designating how, when, where, and by whom the said bill of exceptions and settlement of the cause, as proposed by your petitioner, together with the amendments thereto, as presented by opposite

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counsel, can be heard, settled, and determined, that it will be practically impossible to perfect such appeal at any time; that your petitioner believes that his clients have a good and meritorious cause on appeal, and is desirous of presenting the same for review to the supreme court of the state of Idaho. Wherefore your petitioner asks that this honorable court make an order specifying when, where, before whom, and in what manner the said proposed bill of exceptions and settlement, together with the amendments proposed thereto, shall be settled and allowed, and for such other order as is meet in the premises.

(Signed) "JAS. W. REID."

This court considered the petition, and made an order directing that the "Honorable Edgar C. Steele, judge of the second judicial district of the state of Idaho, be, and he is hereby, appointed and directed, at his earliest convenience, to settle the said bill of exceptions, and, when so settled, to certify the same as provided by law." The plaintiffs now file a petition, in which it is alleged that the judgment in the action was entered April 17, 1897, and averring facts showing that the defendants were guilty of laches in not procuring a settlement of the bill of exceptions; that plaintiffs had attended at divers times and places pursuant to notice to be present, upon which occasions defendants made no efforts to have the bill of exceptions settled; and ask for a rehearing of the motion for said order, principally on the ground that no notice of the application for said order was given to them.

We cannot entertain petitions for rehearing in cases of preliminary motions. To do so, we would be continually harassed with such applications and the archives of the court would soon be plethoric with papers of no value or utility to anyone. The rules wisely provide for petitions for rehearing from the final decision of this court. In case of an erroneous order made in a preliminary matter, whether procured by deception or otherwise, the party aggrieved can have his remedy when the cause comes here upon its merits. But we cannot now determine in this case whether the right of appeal has been lost or not, or whether the bill of exceptions

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should be settled or not. If the right of appeal is barred by limitation, it would seem an idle and useless thing to settle defendants' bill of exceptions, yet we cannot see how the plaintiffs can be prejudiced by such settlement. Counsel for petitioner cites us to *Hayne on New Trial and Appeal*, sec. 165; *Boggs v. Clark*, 37 Cal. 236; *Chabot v. Tucker*, 39 Cal. 434; and *Hopkins v. Railroad Co.*, 44 Cal. 389—which authorities we have carefully examined, but fail to see their relevancy to the matter before us. The authorities cited relate to the discretion of the trial court in granting a new trial or in dismissing a motion for new trial. They possibly suggest the remedy open to the petitioners here. We would not have filed an opinion in this matter, but to call the attention of the bar, and especially of counsel in this case, to the impropriety of filing a petition for rehearing in the matter of interlocutory orders in this court. Hereafter we will only notice petitions for rehearing in proper cases.

Huston, C. J., and Sullivan, J., concur.

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(June 9, 1899.)

CROCHERON v. SHEA ET AL., AS BOARD OF COUNTY COMMISSIONERS.

[57 Pac. 707.]

FINDING WARRANT INDEBTEDNESS—VALIDITY OF BONDS—CONSTITUTIONAL LAW—VALIDATING ACT.—A board of county commissioners proceeded under the provisions of the act of March 8, 1895, to fund outstanding warrant indebtedness of the county, submitting the question to the electors at an election called for the purpose, at which election more than two-thirds of the electors voted in favor of issuing the proposed bonds; after due notice, bids were received, and one bid for the entire issue was accepted, the bonds duly engraved and signed ready for delivery when an agreed case was submitted to the district court for the purpose of determining the validity of the proposed bonds, the principal contention being that said act of March 8, 1895, was void; 1. Because not constitutionally passed; 2. Because the subject thereof was not expressed in the title. *Held*, that the legislature having re-
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enacted the act of March 8, 1895, and passed an act validating all bonds theretofore issued under said act, that the court will not inquire into or determine the validity of said act as originally passed, as such question is immaterial to the validity of the proposed bonds.

(Syllabus by the court.)

APPEAL from District-Court, Owyhee County.

S. H. Hays and Kingsbury & Parsons, for Appellant.

We have never heard the subject matter of the act of 1895 questioned as to any of its provisions. This act provides two methods of issuance of bonds. Which method is to be pursued depends, not wholly on mind of board of county commissioners, but depends rather on what use, effect and object is to be accomplished with the bonds. If their issuance is to increase or to create any indebtedness of the county, then, under article 8, section 3, of our constitution, this question must be submitted to a vote of the people. But if, on the other hand, their issuance is not to create nor to increase any indebtedness, then said provision of the constitution has no application. It is conceded that either a sale of the bonds for cash, or the giving of a valid negotiable obligation for an invalid non-negotiable claim, would be the creation and increasing of the indebtedness of the county and comes under the provisions of section 3, article 8 of constitution. On the other hand, an exchange of one form of indebtedness for another drawing less interest does not create any indebtedness and its effect is to decrease the liability. The statute says such an exchange may be made when the county's interest requires and "without vote of the people." In short, the statute assumes that the board may be by the legislature empowered to decrease the county's liability by an exchange of form of evidence of indebtedness and lowering rate of interest without violating any provision of constitution relating to increase or creation of indebtedness. This would seem to be a self-evident proposition. This statute of 1895 seems to have been drawn by one familiar with the case of *Doon Tp. v. Cummins*, 142 U. S. 366, 12 Sup. Ct. Rep. 220. (*Aetna Life Ins. Co. v. Lyon Co.*, 82 Fed. 933; *Board of Commrs. v. Standley*, 24 Colo. 1, 49 Pac. 26; *Hotchkiss v. Marion*, 12 Mont. 218, 29 Pac. 851.)

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Certainly we do not need to cite authorities to the point that proceedings under an act, valid as to its provisions, and questioned only as to method of passage, can be validated by subsequent legislation. We herewith quote in full the validating act of 1899: "Section 1. All bonds heretofore duly issued under, in pursuance or by virtue of, and in accordance with, the provisions of any act of the first, second, third or fourth sessions of the legislature of the state of Idaho, are hereby declared to be good, valid and binding obligations, any question as to the manner of the passage of any such act or acts notwithstanding; and their validity shall not be questioned in any court." Approved March 6, 1899. We refer to but one authority, as we find none *contra*. (Cooley's Constitutional Limitations, 6th ed., 466.)

J. G. Watts, for Respondent, files no brief.

QUARLES, J.—On October 26, 1897, an agreed case, without action, under the statute, was filed in the court below, in which statement is contained a transcript of House and Senate journals of the legislature relating to the passage of that certain act of March 8, 1895, entitled "An act to amend chapter 6 of title 13 of the Revised Statutes of Idaho," and a statement of various steps taken by the defendants, who constitute the board of county commissioners of Owyhee county, in their efforts to fund \$61,000 of outstanding warrant indebtedness of said county; and attached to said statement as exhibit "A," made a part thereof, is a transcript of the records of said board of county commissioners relating to the matter in question. The points submitted to the court for decision we quote from the agreed case, as follows, to wit: "1. Can the court go behind the enrolled bill, and to the journal of the two houses of the legislature, when inquiring into the question as to whether or not the constitutional requirements were complied with in the passage of a legislative enactment, and for the purpose of passing upon the validity of the bill? 2. If the court can go to the journals of the legislature, and behind the properly enrolled bill, is the act in question void by reason of the failure of the journals and records of the legislature to show a compliance with the requirements of the constitution of the state of Idaho in the passage of the bill

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when the same was under consideration? 3. Is said act of the legislative assembly approved March 8, 1895, a valid act, and existing statute of law of this state? 4. If said act of the legislature approved March 8, 1895, is not a valid act and existing statute of law of this state, have said board of county commissioners, by their proceedings as shown in exhibit A complied with any existing and valid law of the state of Idaho authorizing the issuance of said bonds, and can said board deliver said bonds to a purchaser as valid and existing obligations of said county of Owyhee?" The trial court held said act of March 8, 1895, void, because not passed in the manner required by the constitution, and rendered judgment enjoining the defendants, as county commissioners, from delivering the proposed bonds to the bidder therefor whose bid had been accepted. From said judgment the defendants appealed to this court.

It appears from the record that all of the steps required by the said act of March 8, 1895, in order to fund the outstanding indebtedness sought to be funded were taken by the defendants. But the facts as to the time and manner of creating said indebtedness do not appear in the record; consequently, the validity of the original indebtedness sought to be funded is not in question, and is not decided in this case. During the pendency of this appeal the legislature has, by act approved February 7, 1899, re-enacted the said act of March 8, 1895, with a sufficient title, viz., "An act providing for the issuance of negotiable coupon bonds for the funding and refunding of county indebtedness: amending chapter 6, title 13, Revised Statutes of Idaho." (See Acts 1899, p. 136.) And by act approved March 6, 1899 (Acts 1899, p. 368), it is provided that all bonds theretofore issued under the said act of March 8, 1895, are and shall be held valid, notwithstanding the manner of the passage of said act. The legislature had authority to pass said validating act. The re-enactment of the act of March 8, 1895, and the enactment of said validating act, renders it immaterial whether the act of March 8, 1895, was originally valid or not, and for that reason we decline to pass upon the constitutionality of the passage of said act, or the sufficiency of the title as originally passed. All that we do decide is that the defendants took those steps required by

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the statute to fund the indebtedness in question, and no good reason is shown in the record why the said proposed bonds should not be delivered to the purchaser thereof. The judgment appealed from is reversed, without costs to either party, and the cause remanded, with instructions to the district court to dismiss the case.

Huston, C. J., and Sullivan, J., concur.

(June 12, 1899.)

WILSON v. WILSON.

[57 Pac. 708.]

NOTICE TO DISMISS APPEAL—SERVICE OF NOTICE OF APPEAL.—Admission of service of notice of appeal by one defendant within the time required by law for service of notice is equivalent to service.

SAME—VOLUNTARY APPEARANCE—JURISDICTION.—Admission of due service of notice of appeal is a waiver of irregular service, and when a party voluntarily appears in court he will be subject to the same jurisdiction as if brought in by regular process.

SAME—SERVICE OF STATEMENT.—Co-respondents cannot take advantage of failure of appellant to serve statement on motion for a new trial on one of their co-respondents, such co-respondent having failed to do so.

UNDERTAKING ON APPEAL.—When the clerk certifies that a sufficient undertaking on appeal in due form of law has been filed, the appeal will not be dismissed on motion, unless a certified copy of such undertaking is presented and it is thus shown that the undertaking is not in due form of law.

CERTIFICATE TO TRANSCRIPT.—Certificate of counsel for respective parties to transcript to the effect that the transcript is correct and contains all of the evidence, *held* sufficient.

ACKNOWLEDGMENT OF MARRIED WOMAN.—The acknowledgment of a married woman must be taken in substantial compliance with the provisions of section 2956 of the Revised Statutes.

DISPOSITION OF COMMUNITY PROPERTY.—Under the provisions of section 2505, the husband has the management and control of the community property, with like absolute power of disposition (other than testamentary), as he has of his separate property, but such power of disposition does not extend to the homestead or to that part of the common property occupied or used by the husband and wife as a residence.

Argument for Appellant.

SAME—SIGNATURE OF WIFE.—The wife's signature is not necessary to an instrument by which the husband conveys or encumbers that part of the community property of which he has absolute power of disposition.

FINDINGS.—The finding of facts must respond to all of the material issues.

PARTNERSHIP.—Held under facts of this case no partnership existed.

SUBROGATION.—When a person, being under obligation to do so, or is interested in so doing, pays the debts of another, he may be subrogated to all the rights, securities or remedies of the creditor whom he satisfies.

SAME.—When one voluntarily, and as a mere volunteer, having no interests to protect, pays the debts of another, the payment operates as an extinguishment of the claim and doctrine of subrogation does not apply.

(Syllabus by the court.)

APPEAL from District Court, Bear Lake County.

John A. Bagley and E. E. Chalmers, for Appellant.

The findings must cover all the material issues and settle the rights of parties. (*Bosquett v. Crane*, 51 Cal. 505; *Nephi Irr. Co. v. Jenkins*, 8 Utah, 369, 31 Pac. 986; *Potwin v. Blasher*, 9 Wash. 460, 27 Pac. 710; *Ernst v. Cummings*, 55 Cal. 179; *Carson v. Thews*, 2 Idaho, 176; 9 Pac. 605.) Plaintiff's payment was not a voluntary payment, and if not and his securities proved to be invalid, then he was entitled to be subrogated as prayed, having theretofore advanced two thousand two hundred and fifty pounds sterling for said business. (*Matzen v. Schaeffer*, 65 Cal. 81, 3 Pac. 92; *Hofman v. Demple*, 52 Kan. 756, 35 Pac. 803; *Everston v. Central Bank*, 33 Kan. 352, 6 Pac. 605; *Crippen v. Chappel*, 35 Kan. 495, 57 Am. Rep. 187, 11 Pac. 453; *Yaple v. Stephens*, 36 Kan. 680, 14 Pac. 222; *Swift v. Kraemer*, 13 Cal. 526, 73 Am. Dec. 603; *Tolman v. Smith*, 85 Cal. 280, 24 Pac. 743; *Lewis v. Chittick*, 25 Fed. 176; *Citizens' Nat. Bank v. Wert*, 26 Fed. 294; *Equitable Mortgage Co. v. Lowry*, 55 Fed. 165; *Memphis etc. Co. v. Dow*, 120 U. S. 287, 7 Sup. Ct. Rep. 482; Wiltsie on Mortgage Foreclosure, sec. 344; *Patterson v. Birdsall*, 64 N. Y. 294, 21 Am. Rep. 609; Harris on Subrogation, sec. 14, p. 19, sec. 139, p. 102.) A mortgagee in possession by consent of the mortgagor is entitled to remain in possession and to receive the rents and profits until his debt is paid.

Argument for Respondents.

(1 Jones on Mortgages secs. 702, 703, 715-718; Wiltsie on Mortgage Foreclosure, sec. 677; *Spect v. Spect*, 88 Cal. 443, 22 Am. St. Rep. 318, 26 Pac. 203; *Edwards v. Wray*, 12 Fed. 42.) Upon a bill of exceptions containing all the evidence plaintiff moved for a new trial of said cause, and, his motion being denied, he duly excepted and appeals from said order assigning as error the denial of said motion. A party to an action is entitled to present on appeal the points, first, that the judgment is not a legal conclusion from the facts found; and second, that the evidence does not sustain the findings or some of them. (*Dowd v. Clarke*, 51 Cal. 262.) There never was a partnership of which plaintiff was a member actually existing or launched, but only an agreement to enter into the partnership relation. To constitute this relation the agreement between the parties must be an executed agreement. So long as it remains executory the partnership is inchoate, not having been called into being by the concerted action necessary under the partnership agreement. (*Meagher v. Reed*, 14 Colo. 335, 24 Pac. 681; *Baldwin v. Burrows*, 47 N. Y. 199; *Grooves v. Tollman*, 8 Nev. 178; *Powell v. Maguire*, 43 Cal. 11; *Stevenson v. Mathers*, 67 Ill. 125; *Martin v. Baird*, 175 Pa. St. 540, 34 Atl. 809.) The acknowledgment of Mrs. Elizabeth H. Wilson to the conveyance is conclusive of that fact as against plaintiff, who is an innocent grantee. (*Friberg v. De Lamar*, 7 Tex. Civ. App. 263, 27 S. W. 151; *Mather v. Jarel*, 33 Fed. 366; 1 Devlin on Deeds, 530, 535; Jones on Mortgages, sec. 500; *Johnston v. Wallace*, 53 Miss. 331, 24 Am. Rep. 699; 2 Wharton on Evidence, 1052; *Pierce v. Feagans*, 39 Fed. 587; *Kerr v. Russell*, 69 Ill. 666, 18 Am. Rep. 634; *Young v. Duvall*, 109 U. S. 573, 3 Sup. Ct. Rep. 414; Browne on Parol Evidence, sec. 304.) Mrs. Wilson did by her letter make "some kind" of acknowledgment and cannot now impeach the certificate thereof. (*Banning v. Banning*, 80 Cal. 271, 13 Am. St. Rep. 156, 22 Pac. 210.)

S. C. Winters and R. S. Spence, for Respondents.

Where a mortgage is given on land owned in common by husband and wife, to secure the debts of the husband, a purchaser of the husband's interest in the land who pays off the mortgage

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debts is not entitled to be subrogated to the mortgagee's rights as against the wife's interest in the land, since she was only a surety for the husband and was as effectually released by the payment of the debt by the purchaser, as if her husband, the principal debtor, had paid it. (*Zeller v. Henry*, 157 Pa. St. 1, 27 Atl. 559; *Cornwell v. Orton*, 126 Mo. 355, 27 S. W. 536; *Kleimann v. Gieselmann*, 114 Mo. 437, 35 Am. St. Rep. 761, 21 S. W. 796; *Bunn v. Lindsay*, 95 Mo. 250, 6 Am. St. Rep. 48, 7 S. W. 473.) And if the appellant paid the prior mortgages or trust deeds with the intent to extinguish them and did so satisfy them, and he got the kind of security he expected to get, he cannot be subrogated to the prior mortgage liens. (*Wentworth v. Tubbs*, 53 Minn. 388, 55 N. W. 543; *Wormer v. Waterloo Agricultural Works*, 62 Iowa, 699, 14 N. W. 331.)

SULLIVAN, J.—The amended complaint, on which this action was tried, demanded the foreclosure of two certain mortgages on real estate and a chattel mortgage. The real estate mortgages are deeds absolute on their face, one given on certain real estate known as the "Howdon ranch," situated in Bannock county, Idaho, and the other on what is known as the "Fish Haven ranch," situated in Bear Lake county, Idaho. The chattel mortgage is in the form of a bill of sale, and given on four hundred head of horned cattle, thirty-five head of horses, and a lot of farming implements and machinery, wagons, harness, furniture, and other personal property. The plaintiff also asked to be subrogated to the rights of certain other mortgagees whose mortgages, he alleges, he had paid, amounting to \$15,000. It is also alleged that the deeds and bill of sale sued on herein were given in consideration of the payment of the mortgages last above referred to as belonging to certain other mortgagees, which payments were made under an agreement with the defendant and respondent, Charles B. Wilson. Plaintiff asks to be subrogated to the rights of G. C. Gray, whose mortgages he paid off on the second day of October, 1895, in the event the court finds that the deed, exhibit "C," was not acknowledged by Elizabeth H, as required by law. The defendant Charles B. Wilson failed to answer, and his default was entered. The defendants Mrs. Dryden, George Reay and Mrs. George Reay, answered, disclaiming

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any interest in the action or in the property in controversy. Defendants Elizabeth H. Wilson and Franc S. Brereton answered, denying the material allegations of the complaint, and, by way of affirmative defense, put in issue many material facts. The court tried the case without a jury, and filed its finding of facts and conclusions of law, and entered judgment of absolute dismissal against the plaintiff, dismissing his cause of action, and gave judgment against him for costs. A motion for a new trial was made, and denied by the court. The appeal is from the judgment and order denying a new trial.

A motion to dismiss the appeal was made by counsel for respondents Elizabeth H. Wilson and Franc S. Brereton, argued by respective counsel, and taken under advisement by the court, which we shall now proceed to decide.

The first ground of said motion is that the notice of appeal was not served upon Charles B. Wilson, the principal defendant. The transcript contains a stipulation in which said Wilson admits that the notice of appeal was served on him on January 12, 1899, the date on which the attorneys for the other respondents admitted service of said notice of appeal, and the date on which said notice was filed by the clerk of the trial court. We think said admission is equivalent to, and is an acceptance of, service of said notice of appeal, and was made within the time provided by law for such service, and gives this court jurisdiction of said respondent. It is a well-settled rule, when a party appears voluntarily in court, he will be subject to the same jurisdiction as if brought in by regular process or notice. (2 Am. & Eng. Ency. of Law, 233.) Admission of due service of notice is a waiver of irregular service, and, in general, any action which is equivalent to acknowledgment of notice waives any defects in such notice.

The second ground of said motion is to the effect that no notice of intention to move for a new trial was ever served on respondent Charles B. Wilson. The transcript contains the admission of said Wilson that he was duly served with the notice of intention to move for a new trial on the sixteenth day of March, 1898.

The third and sixth grounds of said motion, to wit, that no statement on motion for a new trial and no transcript on appeal

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were ever served on defendant C. B. Wilson, are matters of which his codefendants cannot take advantage, and, Wilson having failed to do so, he has waived them.

The fifth ground of said motion is that no undertaking was ever filed, on either appeal, within five days after the service of the notice of appeal. The clerk of the trial court certifies that a sufficient undertaking on appeal, in due form of law, was filed in said cause on the twelfth day of January, 1899. As counsel for respondents have failed to present a copy of said undertaking to this court, we think the certificate is sufficient, under the rule of this court governing that matter.

The seventh ground of said motion is that the transcript is not certified as required by the rules of this court and by law. To the transcript is attached the certificate of the attorneys for appellant and respondents, to the effect that the transcript is correct, and contains all of the evidence in the case. Counsel for respondents, having thus certified that the transcript is correct, will not be heard to contradict such certificate, unless it is shown that the certificate was obtained by trick, fraud or deceit, and, as a matter of fact, that such transcript is not a true and correct transcript. No such showing has been made or attempted. The disposition of the first seven grounds of said motion disposes of the eighth ground thereof. The motion to dismiss is denied.

It appears from the record that said Charles B. Wilson and Elizabeth H. Wilson were husband and wife at the dates of the mortgages sought to be foreclosed; that in the spring of 1896 they separated, and on the seventh day of May, 1896, the latter brought an action for divorce, and on the seventeenth day of September, 1897, a divorce was granted; that on the twenty-sixth day of August, 1896, she filed her declaration of homestead on said Fish Haven ranch; that \$750 of the money paid for said ranch belonged to said Elizabeth H.; that on the thirtieth day of October, 1897, the defendants Elizabeth H. and Franc S. Brereton intermarried; that on the twenty-first day of October, 1895, the plaintiff, who had then but recently arrived from England, paid in full a large amount of indebtedness, owing by said Charles B. Wilson, secured by mortgages and trust deeds, in

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consideration of which said Charles B. Wilson and Elizabeth H. Wilson executed the mortgages (which are on the face deeds absolute) sought to be foreclosed in this action; that Charles B. Wilson also gave a bill of sale to the plaintiff of all of the cattle, horses and machinery on the Howdon ranch; that it was also understood and agreed that the plaintiff should have the possession, management, control and power to sell all of the property mentioned in said mortgages and bill of sale for a period of three years, and to apply the proceeds of such sales upon said indebtedness, and at the end of said period of three years, if the business proved profitable, plaintiff was to reimburse himself for all money advanced and paid by him, and, after so paying himself, to reconvey to said Charles B. Wilson and Elizabeth H. whatever remained of said property; that, in pursuance of said agreement, plaintiff took possession of all of said property, both real and personal, and has held the same, except said Fish Haven ranch, which Elizabeth H. took possession of, and ousted plaintiff, on her return from Utah, in 1896. It is also shown that said deeds exhibits "A" and "C" were signed by Elizabeth H. Wilson and Charles B. Wilson. Elizabeth admits the signing, but avers that her acknowledgment was not taken as required by law. It appears that she signed the same at the request of her husband, and then wrote the following note to the notary who certified to such acknowledgment, to wit:

"Fish Haven, Bear Lake Co., Idaho, 2nd Oct., 1895.

"J. C. Rich, Esq.

"Dear Sir: Just a line to inform you I signed the two documents of my free will and accord. Yours truly,

"E. H. WILSON."

Upon the receipt of said note, J. C. Rich, certified to the due acknowledgment of the execution of said deeds as having been made by E. H. Wilson. She now attacks said deeds on the ground that her acknowledgments thereto were not taken as required by law, and upon that issue the court sustained her contention.

But it is contended by counsel for plaintiff that her signature was not necessary to the instrument conveying the Howdon ranch, and that her defective acknowledgment to that in-

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strument in no wise affected the validity of said instrument, as the property conveyed thereby was not the homestead of the defendant Elizabeth H. Wilson, or was not a part of the community property occupied or used by the husband and wife as a residence. Section 2505 of the Revised Statutes of 1887 provides that the husband has the management and control of the community property, with the like-absolute power of disposition (other than testamentary) as he has of his separate estate; but such power of disposition does not extend to the homestead, or to that part of the common property occupied or used by the husband and wife as a residence. Under the provisions of that section, the husband had the absolute right to dispose of and convey the said Howdon ranch without the signature of his said wife, as it was not the homestead or a part of the common property occupied or used by the husband and wife as a residence. Hence, said instrument or deed which was given as security for the payment of money was valid without the wife's signature, and was not rendered invalid by the wife having signed it, and her acknowledgment thereto being defectively taken. (*Tolman v. Smith*, 85 Cal. 280, 24 Pac. 743.)

As to the other deed which conveyed the Fish Haven ranch, a different state of facts exists. At the time said deed was made, Charles B. Wilson and Elizabeth H. Wilson occupied and used the same as a residence, and it was a part of the common property. The evidence establishes beyond a doubt that Mrs. Wilson did not appear before the acknowledging officer; that such officer did not make her acquainted with the contents of said instrument, without the hearing of her husband. It shows that none of the requirements of section 2956 of the Revised Statutes of 1887 were complied with in taking said acknowledgment; and for that reason said instrument was not a valid conveyance or instrument.

Counsel for appellant contend that the finding of facts does not cover the material issues made by the pleadings, and for that reason does not settle the rights of the parties. The rule is well settled that the finding of facts must respond to all of the material issues, and, if it does not do so, the rights of the parties are not settled thereby. (*Bosquett v. Crane*, 51 Cal.

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505; *Phipps v. Harlan*, 53 Cal. 87; *Ernst v. Cummings*, 55 Cal. 179; *Carson v. Thews*, 2 Idaho, 176, 9 Pac. 605; *Nephi Irr. Co. v. Jenkins*, 8 Utah, 369, 31 Pac. 986.)

Upon a careful examination of the pleadings, we conclude that there are a number of material issues made by the pleadings to which the finding of facts fails to respond. The court found that a partnership existed between the plaintiff and defendant Charles B. Wilson and others. We do not think said finding is sustained by the evidence. The evidence shows that an effort to form a partnership was made by William T. Wilson, and for a time he no doubt believed that the partnership contract contained in the transcript had been properly executed and business was being done under it. But the evidence shows that he was mistaken, and had been deceived by defendant Brereton in that regard, and, as a matter of fact, no business whatever was ever done by said contemplated copartnership. The witness G. C. Gray, who had large money transactions with defendant Charles B. Wilson, covering a considerable period of time, and who was a keen, shrewd banker, took as security mortgages on nearly all, if not all, of the property in controversy as the property of said Charles B. Wilson. Mr. Gray testified that he had done a great deal of business with said Charles B. Wilson, and that in 1894 or 1895 he (C. B. Wilson) was owing him (the witness) \$6,500, and that in all his business transactions with Charles B. Wilson he had no knowledge of the existence of a partnership wherein William T. Wilson was a partner. A trust deed was given to witness Gray, as trustee, in which was included some of the property now claimed by the defendants to have belonged to the alleged partnership, and defendant Brereton testified in regard to what was said by him at the time said deed was given, as follows: "I might have said to Mr. Senter and Mr. Bunting, when the trust deed was given to Mr. Gray, that Dr. Wilson had helped Charlie before, and I was confident he would help him again; that he had sent Charlie money to put into cattle, and I thought he would advance more money. The money that Dr. Wilson sent was just an investment. I think he expected something in return." Had said witness known at that

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time that Dr. Wilson and McRae were partners in said business, and that the property conveyed by said deed belonged to such copartnership, it would have been the most natural thing for him to have said so, instead of saying what he did on that occasion. The paper marked "Partnership Deed" was shown said witness, and he testified that the words, "Signed under protest," and written in pencil across said deed, were written by said C. B. Wilson about a week before he signed said deed. Charles B. Wilson testified that the agreement to enter into partnership was never executed; that the partnership was never entered into, and that no business was ever done under any partnership; that at the time he signed said agreement under protest he was very hard pinched, and needed money. The plaintiff, W. T. Wilson, testified that there was no partnership; that Brereton had led him to believe that said partnership agreement had been signed, but afterward admitted that it had not been legally signed. There is no evidence in the record to show that any business had been transacted under any partnership agreement whatever. Elizabeth H. Wilson testified that her husband had told her that plaintiff was his partner. Brereton, who was at one time the confidential friend of Charles B. Wilson, and assisted him in getting money from plaintiff, testified that a partnership existed, and bases his testimony on said partnership agreement—an agreement which he, as go-between, got Charles B. to sign under protest. Although a confidential friend (apparently) of the Wilsons, and conversant with the business of Charles B., he failed to show a single business transaction under said partnership agreement, of all the many business transactions Charles B. must have had in conducting the Howdon ranch, consisting of about one thousand acres, in buying, selling, and caring for the large number of cattle connected with said ranch, borrowing money and purchasing machinery to carry on said ranch. Out of all those many business transactions, not one is shown to have been done as a partnership transaction. The court erred in finding that a copartnership existed between William T. and Charles B. Wilson and Charles Alexander McRae.

In case the trial court should hold the acknowledgment of Elizabeth H. Wilson to the deed conveying the Fish Haven

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ranch defective, the plaintiff asked to be subrogated to the rights of the mortgagee, G. C. Gray, in the mortgages conveying said ranch to said Gray, which mortgages were paid off and satisfied by the plaintiff on the second day of October, 1895. The court found, as a conclusion of law, that the plaintiff was not entitled to be subrogated to the rights of said Gray under said mortgages. It appears from the record that the plaintiff, under an agreement with defendant C. B. Wilson, paid off a large amount of indebtedness due from C. B. Wilson to said Gray and divers other persons, which indebtedness was secured by mortgages and trust deeds on the Fish Haven and Howdon ranches and other property; that the agreement was, in consideration of such payments, C. B. Wilson would give to the plaintiff security on said ranches, and a bill of sale of certain personal property to secure the money so paid, and also give him possession of said property, and the right to control and sell the same; and, in pursuance of said agreement and such payments, deeds absolute on their face were made, signed, and acknowledged as above set forth, and possession of all of said property was given to the plaintiff. Thereafter Elizabeth H. Wilson ousted the plaintiff from the Fish Haven ranch, and has since retained possession thereof. The said deed conveying said Fish Haven ranch to plaintiff is void because of the defective acknowledgment of Elizabeth H. Wilson. Plaintiff paid off a valid lien on said ranch, with the agreement and understanding that he should have a valid mortgage (which was a deed on its face) of said ranch to secure the repayment of the money so advanced by him. Under those facts, is the plaintiff entitled to be subrogated to the rights and remedies of the mortgagee whose claim he paid, as above set forth? "Subrogation," as defined by the leading text-writers and lexicographers, is the substitution of one person in the place of another as a creditor, the new creditor succeeding to the rights of the former; the mode by which a third person who pays a creditor succeeds to his rights against the debtor. Under that definition, when one person, being under obligation to do so, or is interested in so doing, pays the debts of another, he may be subrogated to all the rights, securities, and remedies of the creditor. (See Harris on Subrogation, sec. 139.) It is also held by respect-

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able authority, where one, as a mere volunteer, having no interest to protect, pays the debts of another, the payment operates as an extinguishment of the claim, and the doctrine of subrogation does not apply. (*McNeil v. Miller*, 29 W. Va. 480, 2 S. E. 335; *Wadsworth v. Blake*, 43 Minn. 509, 45 N. W. 1131.) The plaintiff, as shown by the facts of this case, was not a mere volunteer, and had interests to protect. The payment of the debts of the defendant C. B. Wilson, a part of which debts were secured by mortgage on said Fish Haven ranch, under the agreement that he should have valid security on said Fish Haven ranch for such payment, clearly brings him within the rule of subrogation above stated, as the security which he received was defeated by the defendants for whom he advanced the money, and who agreed to give him valid security. It is contended by counsel for defendants that plaintiff got the kind of security he bargained for and expected to get, and for that reason he cannot be subrogated. In that counsel is mistaken. Plaintiff did not get the kind of security he bargained for and expected to get. He did not expect to get security that did not secure, and that could be defeated by the party giving it. He stipulated for security, and failed to get it, and is entitled to be subrogated to all of the rights and remedies of the creditor or creditors whose claims he paid, to the extent which said claims were a lien on said ranch. The judgment must be reversed, and the cause remanded, with instructions to grant a new trial. In case none of the parties care to introduce other testimony, the court may hear argument of respective counsel on the evidence as it appears in the record or taken from the reporter's notes, and make finding of facts and conclusions of law and enter judgment in conformity with the views expressed in this opinion. Costs of this appeal are awarded to the appellant.

Huston, C. J., and Quarles, J., concur.

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(June 16, 1899.)

IN RE WILLIAM BOYLE.

[57 Pac. 706.]

HABEAS CORPUS—INSURRECTION.—In case of insurrection or rebellion, the governor, or military officer in command, for the purpose of suppressing the same, may suspend the writ of *habeas corpus*, or disregard such writ, if issued.

SAME—PROCLAMATION OF GOVERNOR.—The truth of recitals of alleged facts in a proclamation issued by the governor proclaiming a certain county of the state to be in a state of insurrection and rebellion will not be inquired into or reviewed on application for a writ of *habeas corpus*.

SUSPENSION OF WRIT—MARTIAL LAW—MILITARY FORCES.—The proclamation of the governor declaring Shoshone county to be in a state of rebellion, and his action in calling to his aid the military forces of the United States for the purpose of restoring good order and the supremacy of the law, had the effect to put into force, to a limited extent, martial law in said county and such action is not in violation of the constitution, but in harmony with it, being necessary for the preservation of the government and its necessary self-defense.

(Syllabus by the court.)

Original proceeding upon application for writ of *habeas corpus*.

T. C. Robertson, Patrick Reddy and Plat B. Elderkin, for Petitioner, file no brief.

Samuel H. Hays, Attorney General, files no brief.

HUSTON, C. J.—This is an application for a writ of *habeas corpus*. To the petition a general demurrer is filed. The only question presented for our determination is, Does the petition state facts entitling the petitioner to the writ? The petition alleges the illegal detention of the petitioner, and sets forth the alleged cause of, and authority for, such detention; and it is upon the alleged illegality or want of authority therefor that petitioner bases his right to the writ. As to the facts set up in the petition, so far as not contradictory or conflicting, for the purposes of this decision, in so far as they are assumed to be true, do they constitute sufficient ground for the issuance of the writ? It appears from the petition that on

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the fourth day of May, 1899, the governor of the state of Idaho issued the following proclamation:

“State of Idaho, Executive Office.

“Whereas, it appearing to my satisfaction that the execution of process is frustrated and defied in Shoshone county, state of Idaho, by bodies of men and others, and that combinations of armed men to resist the execution of processes and to commit deeds of violence exist in said county of Shoshone; and whereas, the civil authorities of said county of Shoshone do not appear to be able to control such bodies of men, or prevent the destruction of property and other acts of violence; and whereas, on Saturday, the twenty-ninth day of April, 1899, at or near the town of Wardner Junction, in said county of Shoshone, state of Idaho, an armed mob did then and there wantonly destroy property of great value, with attendant loss of life; and whereas, said destruction of property, with attendant loss of life, by mob violence, as above set forth, is but one and a repetition of a series of similar outrages covering a period of six years or more just passed, the perpetrators of said outrages seeming to enjoy immunity from arrest and punishment through subserviency of peace officers of said county of Shoshone, or through fear on the part of said officers to such bodies of lawless and armed men; and whereas, I have reason to believe that similar outrages may occur at any time, and believing the civil authorities of said county of Shoshone are entirely unable to preserve order and protect property: Now, therefore, I, Frank Steunenberg, governor of the state of Idaho, by virtue of authority in me vested, do hereby proclaim and declare the said county of Shoshone, in the state of Idaho, to be in a state of insurrection and rebellion. In testimony whereof, I have hereunto set my hand and caused to be affixed the great seal of the state. Done at the city of Boise, the capital of the state of Idaho, this fourth day of May, A. D. 1899, and of the independence of the United States of America, the one hundred and twenty-third.

“FRANK STEUNENBERG.

“By the Governor.

“M. PATRIE,
“Secretary of State.”

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That thereafter, upon the call of the governor, a military force was sent into said Shoshone county by the President of the United States, which proceeded at once to secure the arrest of the parties engaged in and who committed the outrages of the 29th of April for the purpose of bringing such parties before the proper tribunal for trial. Among the parties who were arrested as being implicated in the murders, and other crimes resulting from the insurrection, riot, or rebellion of the 29th of April, was the petitioner, and he bases his claim to be discharged from such arrest upon various grounds: "1. No insurrection, riot, or rebellion now exists in Shoshone county; 2. The governor has no authority to proclaim martial law, or suspend the writ of *habeas corpus*; 3. That martial law does not exist in Shoshone county, and has not been proclaimed in said Shoshone county by anyone having authority to make such proclamation; 4. That the little disturbance of the 29th of April is over; that the parties implicated in it, after having destroyed about a quarter of a million dollars of property, and committed several murders, have retired to their homes; and that, in recognition of the inalienable rights of the citizen, they ought not to be disturbed; 5. That the governor had no right or authority to send an agent or representative to Shoshone county to consult and advise with the military officer sent there by the federal government to assist in putting down the insurrection and restoring order in said county."

Counsel have argued ably and ingeniously upon the question as to whether the authority to suspend the writ of *habeas corpus* rests with the legislative or executive power of the government; but, from our view of this case, that question cuts no figure. We are of the opinion that whenever, for the purpose of putting down insurrection or rebellion, the exigencies of the case demanded for the successful accomplishment of this end in view, it is entirely competent for the executive or for the military officer in command, if there be such, either to suspend the writ or disregard it, if issued. The statutes of this state make it the duty of the governor, whenever such a state or condition exists as the proclamation of the governor shows does and has existed in Shoshone county for the past

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six or seven years, to proclaim such locality in a state of insurrection, and to call in the aid of the military of the state, or of the federal government, to suppress such insurrection, and re-establish permanently the ascendancy of the law. It would be an absurdity to say that the action of the executive, under such circumstances, may be negatived, and set at naught by the judiciary, or that the action of the executive may be interfered with or impeded by the judiciary. If the courts are to be made a sanctuary, a city of refuge, whereunto malefactors may flee for protection from punishment justly due for the commission of crime, they will soon cease to be that palladium of the rights of the citizen so ably described by counsel.

Section 7405 of the Revised Statutes provides: "When an armed force is called out for the purpose of suppressing an unlawful or riotous assembly, or arresting the offenders and is placed under the direction of any civil officer, it must obey the orders in relation thereto of such civil officer."

The facts set forth in the governor's proclamation warranted his action. It is true that some of the facts recited therein are negatived by averment in the petition, which would seem to put in issue the truth or falsity of those recitals. On application for writ of *habeas corpus*, the truth of recitals of alleged facts in a proclamation issued by the governor proclaiming a certain county to be in a state of insurrection and rebellion will not be inquired into or reviewed. The action of the governor in declaring Shoshone county to be in a state of insurrection and rebellion, and his action in calling to his aid the military forces of the United States for the purpose of restoring good order and the supremacy of the law, has the effect to put into force, to a limited extent, martial law in said county. Such action is not in violation of the constitution, but in harmony with it, being necessary for the preservation of government. In such case the government may, like an individual acting in self-defense, take those steps necessary to preserve its existence. If hundreds of men can arm themselves and destroy vast properties, and kill and injure citizens, thus defeating the ends of government, and the government be unable to take all needful and necessary steps to restore law and

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maintain order, the state will then be impotent, if not entirely destroyed, and anarchy placed in its stead. It is no argument to say that the executive was not applied to by any county officer of Shoshone county to proclaim said county to be in a state of insurrection, and for this reason the proclamation was without authority. The recitals in the proclamation show the existence of one of two conditions, viz.: That the county officers of said county, whose duty it was to make said application, were either in league with the insurrectionists, or else, through fear of the latter, said officers refrained from doing their duty. Under the circumstances, it was the duty of the executive to act without any application from any county officer of Shoshone county. This conclusion is based upon what we deem a correct construction of the provisions of our constitution and statutes in force, construed *in pari materia*. It having been demonstrated to the satisfaction of the governor, after some six or seven years' experience, that the execution of the laws in Shoshone county, through the ordinary and established means and methods, was rendered practically impossible, it became his duty to adopt the means prescribed by the statute for establishing in said county the supremacy of the law, and insure the punishment of those by whose unlawful and criminal acts such a condition of things has been brought about; and it is not the province of the courts to hinder, delay, or place obstructions in the path of duty prescribed by law for the executive, but rather to render to him all the aid and assistance in their power in his efforts to bring about the consummation most devoutly prayed for by every good and law-abiding citizen in the state. The various questions raised by counsel have been considered by the court, and it is our conclusion that the petition does not state facts which show that the writ demanded ought to issue; wherefore the said demurrer has been sustained, and the writ denied.

Quarles and Sullivan, JJ., concur.

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(June 17, 1899.)

STATE v. BEARD.

[57 Pac. 867.]

RAPE—ASSAULT—VERDICT—EVIDENCE OF INTENT.—A verdict of guilty on the charge of assault with intent to commit rape will not be disturbed where the evidence shows an assault, and the question of intent is fairly submitted to the jury, although the evidence bearing upon the question of intent may be slight.

(Syllabus by the court.)

APPEAL from District Court, Bear Lake County.

T. L. Glenn and Allen Miller, for Appellant.

The evidence is wholly insufficient to sustain the verdict. (*Bozeman v. State*, 34 Tex. Cr. Rep. 503, 31 S. W. 389; *State v. Biggs*, 92 Iowa, 125, 61 N. W. 417; *People v. Brown* 47 Cal. 447; *Blannett v. State*, 8 Ohio Cir. Ct. Rep. 322; *People v. Fleming*, 94 Cal. 308, 29 Pac. 647; *Stienkie v. State* 33 Tex. Cr. Rep. 65, 24 S. W. 909, 25 S. W. 287; *Fields v. State* (Tex.), 24 S. W. 907; *Toulet v. State*, 100 Ala. 72, 14 South. 403; *Skinner v. State*, 28 Neb. 814, 45 N. W. 53; *Commonwealth v. Merrill*, 14 Gray, 415, 77 Am. Dec. 336; 5 Criminal Defenses, 887; *People v. Royal*, 53 Cal. 62.)

Samuel H. Hays, Attorney General, for the State.

No brief filed.

QUARLES, J.—The defendant was convicted of the crime of assault with intent to commit rape, moved for a new trial, which was denied, and appealed from the order denying him a new trial, and from the judgment of conviction.

The first error assigned by the appellant relates to the action of the court in overruling defendant's demurrer to the information. After charging defendant with the crime of "assault with intent to commit rape," the offense is charged in the information in the following words, to wit: "The said Daniel Beard on or about the fifteenth day of January, 1899, at the county of Bear Lake and state of Idaho, and prior to the filing of this

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information, in and upon one Mary E. Lindsay, a female child under the age of eighteen years, not the wife of the said Daniel Beard, an assault did make, and her, the said Mary E. Lindsay, then and there, did beat, bruise, wound and ill-treat, with intent her, the said Mary E. Lindsay, violently and against her will feloniously to ravish and carnally know and carnally abuse." We think that the information was sufficient, and that the demurrer was properly overruled.

The only other assignment of error that we deem important, and which raises the vital question in this case, is that "the evidence is wholly insufficient to sustain the verdict." The evidence was very brief, and to the effect that the defendant and the prosecutrix started from Noonan Valley in an open, ordinary bobsled, upon which was an ordinary wagon box, January, 15, 1899, to go to Montpelier, a distance of eighteen miles; that while both were seated on the bottom of the wagon box, and about five miles from the point of starting, the defendant put his hand up the clothes of the prosecutrix, and felt her person; that prosecutrix objected, and tried by force to remove defendant's hand, but was unable to do so; that defendant persisted, and the prosecutrix continued to resist, defendant holding her by her clothes, and thus detaining her against her wishes, until she finally broke from his grasp and jumped out of the wagon box. This occurred in the vicinity of a dwelling, and not far from parties on the highway. The prosecutrix was a girl of sixteen years; the defendant, a married man, whose wife was in bad health. After the prosecutrix jumped from the sled, defendant entreated her to return and resume the journey, which she refused to do; but finally she did agree that if he would ride in one end of the wagon box, and she in the other, she would go back home, which they did, the journey to Montpelier being abandoned. Defendant entreated the prosecutrix not to tell her father what had happened, but she refused to do so, and told him that she would inform her father as soon as she saw him, and the prosecutrix did promptly inform her father of the occurrence.

Among other instructions given to the jury, the court gave the following: "The jury are instructed that an assault is an

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unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another. A particular assault is charged by the information in this case, to wit, an assault with intent to commit rape; and should the jury find from the evidence, beyond a reasonable doubt, that the defendant is guilty of an assault only, without intending to commit the crime of rape, it is their duty to find the defendant guilty of an assault only." Another instruction given is as follows: "In every crime or public offense there must exist a union or joint operation of act and intent or criminal negligence."

The assignment of errors by the defendant is as follows: "1. The court erred in overruling the demurrer to the information; 2. The court erred in the admission of testimony to the jury; 3. The court erred in refusing to admit testimony to go to the jury; 4. The court erred in its instructions to the jury; 5. The court erred in refusing to instruct the jury as requested by the defendant; 6. The court erred in overruling the motion for a new trial; 7. The verdict is contrary to the law and the evidence."

The second, third, fourth and fifth specifications of error are too general, vague, indefinite and uncertain to be entitled to any consideration. It has been well said of an assignment of errors that "its twofold office is to apprise the appellate court of the specific questions presented for its consideration, thus very materially lessening its labor in the decision of the case, and to inform the opposite party or his counsel of the points intended to be relied upon, that he may thereby be guided in the preparation of his brief, and that the discussion be more limited and concentrated." (2 Ency. of Pl. & Pr. 921.) And in same volume, at page 938, it is said: "Each specification of error, like a paragraph or count of a pleading, must be single, clear, certain and complete in itself. A number of defective specifications cannot be combined to make one good one."

The first error has heretofore been considered.

The sixth and seventh assignments of error simply go to the sufficiency of the evidence. Under some of the authorities, the evidence is not sufficient; under others, it is sufficient. That the defendant committed an unlawful assault upon the prosecu-

Argument for Appellant.

trix, and violated the law as well as common decency, is shown by the undisputed evidence in the case. He assaulted, she resisted; and, without any inviting response, he persisted, using force. The questions of defendant's intent was fairly presented to the jury, and they found that the assault was made with intent to commit rape. We do not feel authorized to disturb that finding, the force used, taken in connection with the surrounding circumstances, the intent to commit rape existing, being sufficient. (See *Hays v. People*, 1 Hill, 351; *Carter v. State*, 35 Ga. 263; *State v. Smith*, 80 Mo. 517; *Dibrell v. State* 3 Tex. App. 456; *State v. Boon*, 35 N. C. 244, 57 Am. Dec. 55.)

The trial court properly denied the motion for a new trial. The order and judgment appealed from are affirmed.

Huston, C. J., and Sullivan, J., concur.

(October 30, 1899.)

STATE v. MULKEY.

[59 Pac. 17.]

ACT TO PROHIBITING GAMBLING CONSTRUED.—The act of February 6, 1899, known as the anti-gambling act, held valid. When the defendant in a criminal action attacks certain sections of an act as violative of the constitution, and it does not appear from the record that any of his rights affected by said sections were involved on the trial, or by the judgment, there remaining (should the sections so attacked be eliminated) sufficient to constitute a valid act that supports the judgment, the court will not pass on the validity of the sections so attacked.

(Syllabus by the court.)

APPEAL from District Court, Idaho County.

James W. Reid, for Appellant.

Said act was not passed by the legislature of the state of Idaho, as provided and required by the constitution of the state of Idaho. (*Cohn v. Kingsley*, 5 Idaho, 416, 49 Pac. 985; *Ex parte Ah Yem*, 53 Cal. 246; *State v. Carr*, 6 Or. 133 425; *Trimble v. State* 27 Ark. 355; *State v. Melville*, 11 R. I. 417; Const.,

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art. 1, sec. 13; art. 17, sec. 1; *Ieck v. Anderson*, 57 Cal. 251, 40 Am. Rep. 115.)

S. H. Hays, Attorney General, for the State.

The title of this act is sufficient. (*State v. Doherty*, 3 Idaho, 384, 29 Pac. 855.) Neither bad grammar or bad English will defeat the operation of the statute. (23 Am. & Eng. Ency. of Law, 369.) It does not appear that in the passage of the act there were any other defects, hence *Cohn v. Kingsley*, 5 Idaho, 416, 49 Pac. 985, does not apply. It is contended that sections 1 and 2 of the act fix no maximum punishment and therefore are of no effect. Such is not the case. Section 6313 of the Revised Statutes provides a maximum punishment in case of misdemeanors not otherwise provided for. The act would not be invalid even in the absence of such provision. (*Martin v. Johnson*, 11 Tex. Civ. App. 628, 33 S. W. 306.)

QUARLES, J.—The appellant was charged with the offense of gambling, by criminal complaint, in the probate court of Idaho county and was tried and convicted; whereupon he appealed to the district court, was again tried, and convicted; and from the judgment of conviction in said district court he has appealed to this court.

The errors assigned by appellant are as follows: "1. That the act under the provisions whereof this action is prosecuted, entitled 'An act to prohibit gambling and to provide for the punishment thereof and for other purposes,' approved February 6, 1899, is unconstitutional and void as to sections 4, 5, 6, 7 and 8 thereof, for that the subject of said act as set out in the title thereof is not embraced in the title of said bill. 2. That the said act as engrossed is different from said act as printed by order of the House of Representatives, and no reported printed amendment shows any change before passing the House of Representatives. 3. That sections 1 and 2 of said act require no maximum punishment. 4. That section 4 of said act violates section 13, article 1, of the constitution of the state of Idaho, which declares that no person shall be deprived of property without due process of law. 5. That section 5 of said act is uncon-

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stitutional, in this: that it is in conflict with section 17 of article 1 of the constitution of the state of Idaho, which provides as follows: The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue without probable cause shown by affidavit particularly describing the place to be searched and the person or thing to be seized.'

6. That section 7 of said act is unconstitutional, in this: that it is in conflict with section 13, article 1, of the constitution of the state of Idaho. 7. That the facts stated in the said complaint do not constitute a public offense. 8. That the said act was not passed by the legislature of the state of Idaho as provided and required by the constitution of the state of Idaho."

The act in question, known as the "Anti-gambling Act," is found at pages 389, 390 of Session Laws of 1899. The record before us does not contain any of the evidence introduced at the trial, except a duly certified transcript of the House and Senate journals relating to the passage of said act by the legislature. The record before us shows that the defendant was convicted upon a specific charge of conducting a game played with cards, to wit, a game of "faro." It does not appear that any of his property was seized or destroyed; hence, it is unnecessary to pass upon the validity of sections 4, 5, 6, 7, and 8 of said act. If said sections be void (which we seriously doubt), as claimed by the appellant, the remaining sections would, under the provisions of section 16, article 3, of the constitution, be valid, if constitutionally passed; as, eliminating these five sections, there would remain sufficient to constitute a valid act which would support the judgment of conviction. This disposes of appellant's first, fourth and fifth assignments of error.

Touching the second assignment of error, an inspection of the record shows that it is based upon the idea that the engrossed bill is different from the printed bill. This contention is not sustained by the record. The legislative journals, as shown by the transcript, do not set forth the printed bill but do show that the bill was printed. The journal of the Senate also shows that one of the senators who opposed the passage of the bill claimed that the bill was not correctly printed, for the reason that the

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word "testifying," in section 7, appeared as "testimony" in the printed bill. The Senate did not take this view of the matter. Upon the record before us the presumption is that the bill was correctly printed, and this assignment of error is not sustained.

There is nothing in the third assignment of error. The act in question fixes the minimum punishment, but does not fix the maximum. Section 1 of said act makes the offense a misdemeanor. Section 6313 of the Revised Statutes, is as follows: "Except in cases where a different punishment is prescribed by this code, every offense declared to be a misdemeanor, is punishable by imprisonment in a county jail not exceeding six months, or by a fine not exceeding three hundred dollars or by both." Reading the act in question with said section 6313 of the Revised Statutes, both the maximum and minimum punishments are provided. There is no constitutional objection to the fixing of the minimum punishment only by the legislature in a particular statute.

The sixth, seventh and eighth assignments of error are based upon the discrepancy claimed to exist between the enrolled bill and the printed bill, to which we have heretofore adverted. If the contention was sustained by the record, it would not vitiate the act in question. The record shows that the bill passed both houses in the manner provided by the constitution. If the word "testimony," in section 7 of the act under consideration, appeared in the enrolled bill, in the printed bill, and in the engrossed bill, it would not vitiate the act in question. As the clear intent of the act, considered as a whole, and especially of section 7, is apparent, that intention could not be defeated by a slight typographical error. It is the duty of courts, in construing and applying statutes that have been constitutionally enacted, to give force and effect to the will and intent of the legislature, and not to defeat that will and intent by giving force to trivial objection based solely on an immaterial typographical error. Finding no error in the record, the judgment appealed from is affirmed.

Huston, C. J., and Sullivan, J., concur.

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(November 9, 1899.)

KNEEN v. HALIN.

[59 Pac. 14.]

PURCHASE PRICE MORTGAGE—SIGNING BY WIFE—COMMUNITY PROPERTY.

Where H. made settlement upon the public domain subject to the pre-emption laws of the United States, and made pre-emption filing for the same and resided thereon, with his wife, and thereafter, while so residing thereon with his said wife, he borrowed money of K. with which to pay the government price for said land, and executed a mortgage to secure the payment of the same to K., and thereafter, on the same day, made his final proof for said land and paid the government price therefor from the money so borrowed, said mortgage is a purchase price mortgage, and is a valid lien on said land, whether signed by the wife or not, and is prior to any right she may have to said land, as community property, by reason of having resided thereon at the date of the execution of said mortgage. The term "price of real property," as used in section 3336 of the Revised Statutes, is the money paid for real property or the debt created by the purchase thereof.

(Syllabus by the court.)

APPEAL from District Court, Latah County.

S. S. Denning, for Appellant.

We contend that we have a purchase money mortgage, which under the common law and our statutes, is given preference over all other claims or liens on the land, even over dower, homestead or community property rights. (See Idaho Rev. Stats., sec. 3336; Smith on Homesteads and Exemptions, secs. 215, 216, 221; 4 Kent's Commentaries, 38, 39; 1 Jones on Mortgages, secs. 464, 466, 467; 28 Am. & Eng. Ency. of Law, 166-174; 19 Am. & Eng. Ency. of Law, 580, 581, and footnote 2.)

George W. Goode, for Respondents, cites no authorities upon the point decided by the court.

SULLIVAN, J.—This is an action to foreclose a mortgage on one hundred and sixty acres of land situated in Latah county. The case was submitted to the trial court upon an agreed stipulation of facts, and judgment went in favor of the defendants, who are respondents here. The appeal is from the judgment and order denying a new trial.

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The stipulated facts are substantially as follows: In February, 1891, the defendants, husband and wife, resided upon the one hundred and sixty acres of land described in the complaint, upon which the husband had previously made a pre-emption filing under the laws of the United States. That on the twenty-seventh day of said month, the defendant Gustav J. Halin borrowed from the appellant \$250, and gave his promissory note, secured by mortgage on said land. The wife did not join in either the note or mortgage. Said money was borrowed with the express agreement that it should be used in payment to the government for the purchase price of said land, and that stipulation as recited in the mortgage is as follows: "This loan is made for the purpose of paying the United States government for the within described tract of land." It is also stipulated that said defendant did make his final proof for said land, and that the money so borrowed was used in paying the government price therefor, to wit, one dollar and twenty-five cents per acre, amounting to \$200, and that the balance of the money so borrowed was used in payment of land office expenses and witnesses' expenses incurred in making said final proof. The defense to this action is based on the grounds that the respondents, who were husband and wife, were residing upon said land at the date of the execution of said mortgage by the husband, and that the wife did not join in the execution of said mortgage. Respondents rely upon the provisions of section 2921 of the Revised Statutes, which section is as follows: "No estate in the homestead of a married person, or in any part of the community property occupied as a residence by a married person can be conveyed or encumbered by act of the party, unless both husband and wife join in the execution of the instrument by which it is so conveyed or encumbered, and it be acknowledged by the wife as provided in chapter 3 of this title." It is contended that said one hundred and sixty acres of land was community property. If it was community property at the date said mortgage was executed, the mortgage created no lien on the land.

The first question to be determined, then, is, Was said real estate community property at the date of the execution of said

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mortgage? It is admitted, that respondents were residing on said land when said mortgage was executed. It is admitted that respondent Gustav J. Halin made his pre-emption filing for said land at the proper United States land office, and thereafter established his residence, with his said wife, upon said land; that the time arrived for him to make his final proof for said land, and pay the government price therefor, which was \$200. The government was the owner of and held the title to said land until said final proof was made, and the price paid therefor. Title to public lands subject to pre-emption could only be acquired by a full compliance with the pre-emption laws of Congress as to settlement, residence, improvements, final proof and payment of the government price therefor. All of these acts must be done before the claimant could get or legally demand title from the government. In the case at bar, before the claimant made his final proof, and paid for said land, he had mortgaged it to the appellant for the express purpose of procuring the purchase money to be paid the government, and expenses connected with making final proof for said land. While it is true the defendant Halin had an inchoate right in said land after his filing for and settlement on said land so long as he complied with the pre-emption laws of Congress, yet such right did not ripen into a title until the last requirements of said laws had been complied with, to wit, making final proof and payment of money. He did not own said land until said proof and payment were made, and the community could not own it before that time. Hence, we conclude that said real estate was not community property at the time said mortgage was executed, and the mortgage lien is prior to any right of the wife. The mortgage was executed on the twenty-seventh day of February, 1891, and thereafter, on that day, Halin made his final proof for said land, and paid for the same out of the money so borrowed. Under the laws of this state all property acquired by the husband after marriage, except that acquired by gift, bequest, devise or descent, is community property. (See Rev. Stats., secs. 2496, 2497.) A mortgage given by the husband for the purchase price of real estate has priority over any statutory right of the wife in such real estate. Section 3336 of the Re-

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vised Statutes provides that: "A mortgage given for the price of real property at the time of the conveyance has priority over all other liens created against the purchaser subject to the operation of the recording laws." Said real property was not community property at the date of the execution of said mortgage, and the mortgage lien is prior to any right of the wife acquired by reason of its becoming community property thereafter. It became community property subject to the lien of said purchase price mortgage. But it is urged that the appellant was not the vendor, and therefore could not have a purchase money mortgage on said land; in other words, no one but a vendor can have a purchase money mortgage. In support of that proposition counsel for respondents cites *Austin v. Underwood* 37 Ill. 439, 87 Am. Dec. 254. In that case the term "purchase money" is defined as meaning "money paid for land or the debt created by the purchase." It is also held in that case that where a party purchases land adjoining a homestead, to be used as a part thereof, and procures the purchase money of a third person as a loan to the purchaser, the money thus paid by the lender will be regarded as purchase money of the land as against the homestead claim of the purchaser. It is stated in the notes to section 2898 of the Civil Code of California (which section is the same as section 3336 of the Revised Statutes above quoted), as follows: "This rule applies even where the mortgage is made to a third person, who, as a part of the same transaction, advances the purchase money." Numerous authorities are then cited sustaining the rule there announced. (See, also, 4 Kent's Commentaries, 39; Smith on Homesteads, secs. 218, 221.) In 1 Jones on Mortgages, section 464, *inter alia*, it is stated as follows: "A purchase money mortgage is good and effectual against the wife of the mortgagor without her joining in the execution of it"—and that this rule applies even where the mortgage is made to a third person. (See, also, *Prout v. Burke*, 51 Neb. 24, 70 N. W. 512.) The judgment of the court below is reversed, and the cause remanded, with instructions to proceed in accordance with the views expressed in this opinion. Costs of this appeal are awarded to the appellant.

Huston, C. J., and Quarles, J., concur.

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(November 20, 1899.)

BOYD v. STEELE, JUDGE.

[59 Pac. 21.]

PROHIBITION—DISMISSAL—RIGHT OF PLAINTIFF TO DIRECT ENTRY IN REGISTER OF ACTIONS.—Under the provisions of section 4354 of the Revised Statutes, which provides that an action may be dismissed by the plaintiff at any time before trial, upon payment of costs, provided a counterclaim has not been made or affirmative relief sought by the defendant, the plaintiff in such a case is entitled to a dismissal upon payment of costs and filing his dismissal with the clerk.

SAME—DUTY OF CLERK.—The clerk could not defeat a dismissal by neglecting or refusing to enter a formal judgment of dismissal.

ENTRY OF JUDGMENT.—If the provisions of said section requires a formal entry of judgment, it is one of the cases in which the law presumes that to have been done which ought to have been done.

EFFECT OF OMISSION TO ENTER JUDGMENT OF DISMISSAL.—The omission to enter a judgment of dismissal did not defeat the plaintiff's dismissal of said action, nor did such dismissal remain in abeyance until the entry of judgment.

(Syllabus by the court.)

Original proceeding for writ of prohibition.

W. T. Birdsall and Orland & Smith, for Plaintiff.

No brief filed.

Willis Sweet and S. S. Denning, for Defendant.

No brief filed.

SULLIVAN, J.—This is an application for a writ of prohibition, and arises out of the following facts: The plaintiff, Joseph H. Boyd, brought an action in the district court of the second judicial district, in Latah county, against Willis Sweet and William L. Spaulding, in which action plaintiff prayed that the assignment of a certain judgment obtained in the case of said Spaulding against the Coeur d'Alene Railway and Navigation Company, made by said Spaulding to defendant Sweet, be set aside and declared void, and that said Boyd be adjudged to be the owner thereof; for a temporary injunction, for a receiver,

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and for other relief, which is fully set out in the prayer to said complaint. Defendants demurred to said complaint, which was overruled. Defendants thereupon filed separate answers, and the plaintiff (who is petitioner here) demurred to one answer, and moved to strike the other. Said plaintiff thereafter, on the twenty-sixth day of April, 1899, through his attorney, directed the clerk of said court to enter upon the proper page in the register of actions a dismissal of said suit. The clerk made the following entry in said book: "April 26, 1899. Order of dismissal filed April 26, 1899. This action is hereby dismissed, at request of plaintiff, who paid all costs." The following paper was filed in said suit on the same day, to wit:

"District Court of Idaho in the Second District.

"In Equity.

"JOSEPH H. BOYD

against

WILLIAM L. SPAULDING and WILLIS
SWEET.

} No. 1907.

"It duly appearing by the pleadings herein that the answer of defendants does not contain a counterclaim or affirmative defense: Now, on motion of R. L. Edmiston, one of the attorneys for the plaintiff herein, it is ordered and adjudged that this action may be, and the same is hereby, dismissed on the payment by plaintiff to the defendants or their attorney of the sum of one dollar, the amount of defendants' costs as taxed herein by the court.

(Signed) "OSCAR LARSON,

"Clerk.

"By E. C. HALL,

"Deputy.

"R. L. EDMISTON and

"ORLAND & SMITH,

"Attorneys for Plaintiff.

"Filed April 26, 1899. Oscar Larson, Clerk. By E. C. Hall, Deputy."

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On the twenty-seventh day of April, 1899, the plaintiff, Boyd, brought another action for the same cause in the circuit court of the United States, in the district of Idaho, against the same defendants. The defendants appeared therein, and filed a plea in abatement, upon the ground of the pendency of said suit in the state court, and attached to said plea were copies of papers, showing that an application had been made to said state court to vacate said order of dismissal; that on May 16, 1899, said plea was overruled by said circuit court, and thereafter, on July 1, 1899, said court made an order wherein it is recited that satisfactory evidence had been furnished, showing that an action between these parties for the same cause was then pending in the state court, and that said action was commenced prior to the one in the circuit court. Further proceedings were ordered suspended in said circuit court until further order. The defendants, on May 25, 1899, moved to vacate and set aside said order of dismissal, supposing, as they say in their brief, that in attempting to dismiss said cause the attorneys for the petitioner had complied with the statutory requirements; that this misapprehension was due to the fact that counsel who drew the petition was in Spokane, Washington, and was not fully advised as to the nature and character of the dismissal proceedings. When the petition to vacate said order of dismissal was presented to the district court, the court stated that the document described as a judgment of dismissal was a void instrument, and therefore of no force or effect; hence there was nothing to set aside or dismiss. Thereupon defendant Spaulding filed his amended answer and cross-complaint. The day after the filing of said amended answer, the plaintiff, Boyd, by his attorneys, who appeared specially for that purpose, and no other, moved for a *nunc pro tunc* order dismissing said action, which motion was denied on the grounds that the provisions of section 4354 that apply to a plaintiff dismissing his action had not been complied with by the plaintiff. Said provisions are as follows: "An action may be dismissed, or a judgment of nonsuit entered in the following cases: 1. By the plaintiff himself, at any time before trial upon payment of costs; provided, a counterclaim has not been made or affirmative relief sought by the cross-complaint or answer of

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defendant. If a provisional remedy has been allowed the undertaking must thereupon be delivered by the clerk to the defendant, who may have his action thereupon; 2. By either party, upon the written consent of the other; 3. By the court, when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal; 4. By the court, when, upon the trial, and before the final submission of the case, the plaintiff abandons it; 5. By the court, upon motion of the defendant, when, upon the trial, the plaintiff fails to prove a sufficient case for the jury. The dismissal mentioned in the first two subdivisions is made by an entry in the clerk's register. Judgment may thereupon be entered accordingly." So far as shown to the court below, the plaintiff had paid the costs, and had the following entry made in the register of actions by the clerk, to wit: "April, 26, 1899. This action is hereby dismissed at request of plaintiff, who paid all costs." That court says, *inter alia*: "No dismissal has been filed by the plaintiff, and the clerk, being governed by the rules which control ministerial officers, must be required to have these prior steps taken, or else his entering judgment would be void." That decision goes off on the point that the said statute requires the plaintiff to file a dismissal, and that he had failed to file it.

We have, perhaps, gone more into the facts of this case than was necessary to a decision of the question raised; but it is one of more than ordinary importance, and we desire to present the facts quite fully. The question for decision is, Did the plaintiff dismiss said action, under the provisions of said section 4354 of the Revised Statutes? It is not contended that the answer contains a counterclaim, and it is not seriously contended that affirmative relief is sought by the answer or cross-complaint, except that the statute of limitations is set up as a defense. We do not think that the plea of said statute is a counterclaim or a demand for affirmative relief, within the meaning of the term "affirmative relief," as used in said section. It appears from the record that the attorney for plaintiff appeared at the office of the clerk of said district court on the twenty-sixth day of April, 1899, and inquired of the said clerk the full amount of costs, due in said case, including defendant's costs

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and the cost of entering judgment of dismissal; and, when the clerk informed him, he thereupon paid all of said costs, and demanded a dismissal of said action, and at the same time presented a formal judgment of dismissal, duly signed by R. L. Edmiston and Orland & Smith, attorneys for plaintiff, which was duly signed by the clerk and filed by him on said twenty-sixth day of April, 1899, a copy of which is above given. On said twenty-sixth day of April said clerk made an entry of the dismissal of said action in his register of actions. Under those facts, was said action dismissed?

It is contended by defendant that this action was not and could not be dismissed until the judgment was entered in the judgment book; and he cites several authorities in support of his contention, and, among them, *Adams v. McPherson*, 3 Idaho, 117, 27 Pac. 577; *Durant v. Comegys*, 3 Idaho, 67, 35 Am. St. Rep. 267, 26 Pac. 755; and *Ah Kle v. McLean*, 3 Idaho, 70, 26 Pac. 937. Those cases went off on the ground that the transcripts failed to show that a judgment had been entered; and as section 4807, of the Revised Statutes, provides that an appeal may be taken within a definite time therein fixed, after the entry of judgment, the court held that the transcripts must show that judgment had been entered before the appeal was taken, the entry of judgment being a prerequisite to the right of appeal. *Stearns v. Aguirre*, 7 Cal. 443, is cited by counsel for respondent. In that case two defendants were jointly sued, and service had on both. One answered, and the other did not. The latter's default was entered, and, without the authority or direction of the court, the clerk entered judgment by default against him. The court held, under section 32 of the Practice Act, and under the facts of that case, that the clerk had no authority to enter judgment. The rule there laid down cannot apply to the case at bar. The judgment there entered was not one of dismissal made on the order or request of the plaintiff. The same may be said of *Kelly v. Van Austin*, 17 Cal. 564. In *James v. Centre*, 53 Cal. 31, it is held that a judgment of dismissal may be entered by the clerk on the application of the plaintiff, notwithstanding a cross-complaint had been filed, provided the cross-

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complaint did not set up a counterclaim. The court says: "The judgment of dismissal in form entered by the clerk was properly entered, inasmuch as no counterclaim had been made." That case does not hold that it is absolutely necessary for a judgment of dismissal to be entered, before the dismissal shall take effect. In *McLeran v. McNamara*, 55 Cal. 503, which was an action in ejectment, involving more than one piece of real estate, and against several defendants, the attorneys for the plaintiff filed a written dismissal of the action as to some of the defendants (naming them), and as to some of the real estate (describing it); and an entry of such dismissal was entered by the clerk in the register of actions, but no judgment of dismissal was entered. The court quotes a part of the Practice Act then in force, which was like our section 4354; and, after quoting as follows: "The dismissal mentioned in the first two subdivisions shall be made by entry in the clerk's register. Judgment may thereupon be entered accordingly"—the court says: "This certainly cannot mean that the plaintiff shall make an entry of dismissal in the clerk's register. All entries in that are made by the clerk, and none are ever made in it by either of the parties. The meaning of that clause doubtless is that, when a plaintiff dismisses an action, the clerk shall enter such dismissal in his register. . . . We think that the dismissal by the plaintiff became operative as soon as filed and entered as aforesaid. If a judgment should have been entered by the clerk, it is one of those cases in which the law presumes that to have been done which should have been done." That case was decided in 1880, and we think the rule laid down in the above quotation is the correct one, as applied to a dismissal made by the plaintiff under the provisions of said section. In the case at bar the plaintiff paid all costs, and filed his dismissal of the suit; and, if the clerk neglected to make an entry in the said matter as required by law, it is one of the cases in which the law presumes that to have been done which should have been done. Section 4354 of the Revised Statutes is identical with section 354 of the Practice Act adopted by the territorial legislature of 1881 (Sess. Laws 1881, p. 74), which act went into effect May 21, 1881. If

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that part of the section of the California Practice Act above quoted is correctly quoted in the case last cited, it has since been amended; for we find in 3 Deering's Code of Civil Procedure of California, section 581, that said section was amended in 1885 in this, as well as other matters, to wit: The period after the word "register" and between the word "judgment" was changed to a semicolon, and the word "judgment" begun with a small letter, thus changing two independent sentences to a compound one. The supreme court of California evidently concluded that said amendment made some change in the meaning of said sentences; for in *Page v. Superior Court*, 76 Cal. 372, 18 Pac. 385, it is held that an action which is directed to be dismissed by the plaintiff under the provisions of section 581 of the Code of Civil Procedure is not dismissed until the judgment of dismissal has been entered in the judgment-book, and an entry of dismissal made in the register of actions; that a mere entry of dismissal in the register of actions is not sufficient. The court says: "The direction to enter a judgment in the judgment-book is mandatory, because it imposes a public duty upon a ministerial officer"; and, "But until the judgment is entered the action is not dismissed." The court in that case does not refer to *McLeran v. McNamara*, *supra*, wherein it held that the dismissal became operative as soon as filed and entered in the register of actions, and that, "if a judgment should have been entered by the clerk, it is one of those cases in which the law will presume that to have been done which should have been done." The case of *Page v. Page*, out of which arose the case of *Page v. Superior Court*, *supra*, was for a divorce. The defendant answered, asking for alimony, which the court allowed, and also allowed counsel fees. Thereafter said order was set aside, and the motion for alimony set for hearing on a day certain. Before that day arrived, the plaintiff filed a dismissal with the clerk, and an entry thereof was made in the register of actions, but no judgment of dismissal was entered in the judgment-book. We think in that case the court arrived at a right conclusion, but gave a wrong reason therefor. The defendant appeared, answered, and asked for alimony—asked for affirmative relief; and for that reason the plaintiff

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could not dismiss said action. In *Acock v. Halsey*, 90 Cal. 215, 27 Pac. 193, it was held that the dismissal of the action by plaintiff did not take effect until the judgment of dismissal was entered in the judgment-book, and the court cites *Page v. Superior Court*, *supra*. *Acock v. Halsey* was a replevin suit. The plaintiff gave an undertaking for the delivery of the property in question to him. The property was taken from the defendants and delivered to the plaintiff. The defendants thereupon gave a redelivery bond, and before the property was returned to them the plaintiff undertook to dismiss his suit. The decision of that case was right, but we think the reasons given for it were wrong. The process of the court had been used to take property from the possession of the defendants without giving them their day in court. In replevin suits, when property has been taken from defendants and delivered to plaintiff, and in divorce suits, when alimony or other relief has been asked for by defendants, voluntary dismissals by plaintiffs ought not to be allowed, and are not permitted by the provisions of said section 4354 of the Revised Statutes. *Rochat v. Gee*, 91 Cal. 355, 27 Pac. 670, was a copartnership settlement. The plaintiff asked for a receiver, an accounting, and dissolution. A receiver was appointed. He qualified, and took possession of the partnership property, and operated a lumber-mill belonging to the firm. The defendant answered, admitting the partnership, but denying the allegations on which plaintiff relied for relief. Thereafter plaintiff filed a dismissal or abandonment of the action, which abandonment was entered in the register of actions. On those facts the court says: "But no judgment of dismissal was ever made or entered, nor was any order of the court made in relation to the matter of abandonment," and holds that the case was not dismissed, and cites as an authority *Page v. Page*, 77 Cal. 83, 19 Pac. 183. It would seem to us that, if a judgment of dismissal had been entered under the facts of that case, the court ought not to have permitted it to stand. It would have been a fraud upon the rights of the defendant, and we apprehend that the provisions of section 581 of the Code of Civil Procedure of California were not enacted to enable the plaintiff to perpe-

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trate a fraud upon the defendant. *Barnes v. Barnes*, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660, is a divorce case, in which defendant did not appear before plaintiff had filed his dismissal. The clerk failed to enter judgment, and the court held that the paper filed by the plaintiff amounted to an order for dismissal, and that until judgment was entered the court retained jurisdiction, and that defendant might answer. With one further reference to California authorities upon this subject, we will close. In the case of *Kaufman v. Superior Court*, 115 Cal. 152, 46 Pac. 904, the court says: "If plaintiff was at that time entitled to dismiss his action, the failure of the clerk to perform his ministerial duties by entering the dismissal, to be entered in his judgment-book, should not and cannot be allowed to affect the substantial rights of the parties. In other words, if plaintiff at that time had the right to dismiss his action, and had taken all the proper steps to that end, that right could not be impaired or lost by the refusal of the clerk to perform a plain duty, or by the subsequent filing of a cross-complaint by one of the defendants, or by both of these circumstances."

It is thus shown that the California decisions are not uniform, and some of them are most unsatisfactory to us. We, however, think that the rule as announced in *McLeran v. McNamara* and *Kaufman v. Superior Court*, *supra*, is the correct one, and that in a proper case, where the plaintiff pays all costs and orders a dismissal, the dismissal cannot be defeated by the refusal or neglect of the clerk to enter a dismissal in the register of actions, or to enter judgment of dismissal. There is no question but that the plaintiff, by his attorney, intended to, and did, dismiss said action. He paid the costs, and the clerk made an entry in the register of actions to the effect that at the request of the plaintiff said action was dismissed, and that he paid all costs. The attorney for plaintiff did not make that entry, nor would it have been proper for him to do so, as it is the duty of the clerk to keep the register of actions, and to make all entries therein. A written form of judgment of dismissal, reciting that the answers of defendants did not contain a counterclaim or seek affirmative relief, and that on

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the motion of R. L. Edmiston, one of the attorneys, said action was dismissed, which writing was signed by said Edmiston, and that in connection with the entry of such dismissal in the proper place in the register of actions, was a substantial compliance with the provisions of said statute applicable to this case. The clerk could not defeat the plaintiff from dismissing said action by neglecting to enter a formal judgment of dismissal, if such a judgment is required by the provisions of said section to be entered. It is not the clerk who dismisses the action like the one at bar. He can neither dismiss, nor prevent a dismissal. The provisions of said section under consideration absolutely authorize the plaintiff to dismiss his action. Neither the clerk nor the court can prevent him from so doing, provided he brings himself within the provisions of said statute. Said section does not, in terms, require a written dismissal to be filed. It requires payment of all costs, and an entry of dismissal in the register of actions, both of which were done in this case. At section 106 of Black on Judgments it is said: "The rendition of a judgment is the judicial act of the court. . . . The entry of a judgment is the ministerial act of spreading on the record a statement of the final conclusions. . . . The omission to enter does not destroy, nor does its vitality remain in abeyance until it is put upon the record. . . . There are certain purposes, however, for which a judgment is required to be duly entered before it can be available, or be attended by its usual incidents. Thus, as above remarked, this is a prerequisite to the right to appeal." The author is there discussing judgments rendered by a court. In the case at bar the plaintiff had the right to dismiss his action without permission of the court, and without its judgment. Had he wished a judgment by way of nonsuit, he must have applied to the court for it. Said section 4354 provides for dismissals by the plaintiff himself, and judgments of nonsuit, which judgments of nonsuit are rendered by the court. We think the last sentence of said section, to wit, "Judgment may thereupon be entered accordingly," applies to judgments of nonsuit, and not to dismissals by plaintiffs.

Argument for the State.

Other points are found in the record, but as the plaintiff dismissed his said action, and the court below thereby lost jurisdiction, it is not necessary for us to pass upon them. A peremptory writ of prohibition ought to issue, and it is so ordered.

Huston, C. J., and Quarles, J., concur.

(November 25, 1899.)

STATE v. MCGRAW.

[59 Pac. 178.]

CRIMINAL LAW—CHALLENGING JUROR—IMPLIED BIAS.—Juror may be challenged for implied bias, on the ground that he is client of opposing counsel. (Rev. Stats., sec. 7834, subd. 2.)

SAME—PEREMPTORY CHALLENGES—ATTORNEY AND CLIENT.—Defendant in criminal case cannot, on appeal, complain of error of trial court in sustaining challenge to an individual juror, when he accepts the panel before exhausting his peremptory challenges. (*State v. Gordon*, 5 Idaho, 297, 48 Pac. 1061.)

EXCUSING JUROR—NEW TRIAL.—Error in excusing a juror is not ground for a new trial in a criminal action. (Rev. Stats., sec. 7941.)

PASSAGE OF BILL BY LEGISLATURE.—Act of February 19, 1895 (Sess. Laws 1895, p. 19), amending section 6765 of the Revised Statutes, properly passed by both houses of the legislature.
(Syllabus by the court.)

APPEAL from District Court, Latah County.

James W. Reid, for Appellant.

Simply because the juror, Marion Butler, was a client of the defendant's attorney was no proper ground of challenge. (Idaho Rev. Stats., sec. 7834, sub. 2.) The statute concerning rape is unconstitutional and void. (*Cohn v. Kingsley*, 5 Idaho, 416, 49 Pac. 985; *State of Idaho v. Baker*, ante, p. 496, 56 Pac. 81.)

S. H. Hays, Attorney General, for the State.

Appellant assigns as error that the court erred in excusing the juror Marion Butler. Under section 7996 of the Re-

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vised Statutes, a copy of the minutes of a challenge interposed to an individual juror and the proceedings and decision thereon are part of the record. But in order to avail himself of an objection in this way a bill of exceptions must be settled as provided in section 7941 of the Revised Statutes. This was not done in this case. In any event, an erroneous decision upon this point would not be reversible. (*State v. Gordon*, 5 Idaho, 297, 48 Pac. 1061.) The second error assigned is that the court overruled the objection of defendant to the introduction of testimony, for the reason that the act under which the information was filed is unconstitutional. We contend that where the general purpose, subject or proposition of the bill is not materially changed by the amendment, that the amendment need not be read on three several days. Only material amendments changing the scope, or purpose of the bill need be read on three several days, for the reason that at the time of the adoption of our constitution we adopted the construction given by the courts of California, and for the further reason that all of the authorities which had passed upon this question at that time had decided in conformity with the rule laid down in California, and that since no court had at that time held to a contrary view, that this court is morally and legally bound to adopt that construction. (See *People v. Wallace*, 70 Ill. 680; *State v. Brown*, 33 S. C. 151, 11 S. E. 641; *State v. Platt*, 2 S. C. 150, 16 Am. Rep. 647; *Supervisors v. Heenan*, 2 Minn. 330 (281); *Miller v. State*, 3 Ohio St. 475; *State v. Doherty*, 3 Idaho, 384, 29 Pac. 855; *Larison v. P. A. & D. R. R.*, 77 Ill. 11; *Ferguson v. M. & M. Bank*, 35 Tenn. 609.)

SULLIVAN, J.—The defendant was prosecuted by information for the crime of rape, convicted, and sentenced to imprisonment for a term of fifteen years. His motion for a new trial was denied, and this appeal is from the judgment and order denying a new trial.

The first error assigned is, the court erred in excusing juror Butler on the ground that he was a client of the attorney for the defendant. Under subdivision 2, section 7834 of the Revised Statutes, a challenge for implied bias may be taken to a

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juror when such juror is a client of the opposing attorney. Counsel for appellant admits such relation existed between himself and said juror. We do not think the court erred in excusing said juror. If it was error, it was without prejudice, as defendant had not exhausted his peremptory challenges when he accepted the jury. (*State v. Gordon*, 5 Idaho, 297, 48 Pac. 1061.) And, further, said exception was not saved by bill, as provided by the provisions of section 7941 of the Revised Statutes, or at all. Error in excusing a juror is not one of the grounds for which a new trial may be granted. (Rev. Stats., sec. 7952.) It also appears in the record at folio 45 that both plaintiff and defendant waived all challenges as to the impaneling the jury.

The second error assigned involves the constitutional passage of the act under which the defendant was prosecuted and convicted. We have examined a certified copy of the House and Senate journals in regard to the passage of said act. It shows that said bill was duly printed, and read three times in each House; that on its final passage in each House said bill was read at length, section by section, and a yea and nay vote taken thereon, which vote was entered on the respective journals; and that said act was passed by a majority of all members present in each House. The act was duly enrolled, signed by the speaker of the House and president of the Senate, and approved by the governor. The bill was regularly passed, and the court did not err in so holding.

Several other errors are assigned, which go to the introduction of evidence, to the instructions given, and to the corroboration of the prosecutrix, all of which we have examined with some care, and in none of them do we find error. The judgment of the court below must be sustained and it is so ordered.

Huston, C. J., and Quarles, J., concur.

Argument for Appellants.

(November 21, 1899.)

**SPAULDING v. COEUR D'ALENE RAILWAY AND
NAVIGATION COMPANY.**

[59 Pac. 426.]

PROCEEDINGS SUPPLEMENTARY TO EXECUTION—JURISDICTION OF JUDGE AT CHAMBERS—RECEIVERS.—A judgment creditor, in proceedings supplementary to execution, brought in a third party, a stranger to the judgment, claiming that such third party held or claimed property belonging to the judgment debtor; the third party appeared and claimed the property adversely to the judgment debtor; a hearing was had before the trial judge, at chambers, who held the property subject to the judgment, and appointed a receiver to take charge of the property and subject it to the satisfaction of the judgment. On appeal, *held*, that the original order appealed from is void for the reason the trial judge exceeded his jurisdiction in making said order, his jurisdiction being limited to making orders provided in section 4510 of the Revised Statutes of Idaho.

(Syllabus by the court.)

APPEAL from District Court, Kootenai County.

Stephens & Bunn, G. W. Bunn and J. T. Morgan, for Appellants.

It is claimed that this is only a proceeding supplementary to execution and a continuation of the action at law. The Idaho statutes (Rev. Stats., secs. 4504-4511), cover proceedings supplementary to execution. Under the statute the judgment creditor, after issuing execution and its being returned unsatisfied, may obtain an order of the judge to examine the judgment debtor (sec. 4504); may by arresting the debtor obtain security against his absconding (sec. 4505); may reach indebtedness due the judgment debtor as by garnishment (sec. 4506); may obtain an examination by order of the judge, of any person claimed to have property of the judgment debtor in his possession (sec. 4507); the judge or referee may order any money or property of the judgment debtor in the hands of other persons turned over (sec. 4509); and under section 4510, if the third person claims such property adversely to the

Argument for Respondent.

judgment debtor, the court or judge may by order authorize the judgment creditor to institute an action against the adverse claimant. This suit was not authorized by order of the court or judge under this statute. It is an original, independent bill in equity. If it be claimed that it is a proceeding under the statute, it is equally an independent new suit subject to be removed to the federal court, because under section 4510 an independent action must be brought where the property is claimed by a third person adversely to the judgment debtor. (*McDowell v. Bell*, 86 Cal. 615, 25 Pac. 128; *Hartman v. Olvera*, 51 Cal. 501; *Town v. Safeguard Ins. Co.*, 4 Bosw. 683; *Allen v. Finch*, 5 Colo. 327; *Everton v. Parker*, 3 Wash. St. 331, 28 Pac. 536.) Such third person's rights cannot be summarily disposed of in the original action. He is entitled to his day in court; to be served with process and pleadings, to answer or demur, to have his case tried on pleadings and proofs under the orderly and usual methods of judicial procedure. But this cannot be regarded as a proceeding under the statute because the statute has not been complied with. (*Herrlich v. Kaufmann*, 99 Cal. 271, 37 Am. St. Rep. 50, 33 Pac. 857; *Adams v. Hackett*, 7 Cal. 187; *Pacific Bank v. Robinson*, 57 Cal. 520, 40 Am. Rep. 120, and note; *McCullough v. Clark*, 41 Cal. 298; *In re Remington*, 7 Wis. 643; *Graham v. Railway Co.*, 10 Wis. 459; *Sqerling v. Calfee*, 7 Mont. 514, 19 Pac. 204; *Lynch v. Johnson*, 48 N. Y. 27.)

Willis Sweet, for Respondent.

Appellant conclude their brief with a discussion in the nature of an objection to the character of the proceedings in the lower court. Of course, their ultimate conclusion is that these proceedings should have been removed to the federal court. We think that phase of the question has been fully presented, as well as fully adjudicated, and that it is unnecessary to pursue it further. What is the nature of the proceeding in question? It is a substitute for the former practice in chancery. (High on Receivers, 3d ed., sec. 401.) Under the code the proceeding is called "Proceedings Supplementary to Execution." It is summary in its character, and was insti-

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tuted to avoid long and expensive suits in chancery, formerly necessary to reach the property subject to the debt. The proceeding in this instance was of a summary character. A receiver was asked for upon the return of the execution unsatisfied; the order appointing the receiver was made at chambers, upon notice to all parties who claimed to have any interest in the property which, by the petition, was claimed to be subject to the payment of the judgment. The proceedings was against the property of the judgment debtor, and might have been had without making the Pacific companies parties. The judge had full power to make the order at chambers. This is a proceeding supplementary to execution. The subdivision of section 4529, under which the receiver was appointed, is a part and parcel of the chapter of Revised Statutes covering supplementary proceedings, and it was under these statutes, construed together, that the judge acted. (Rev. Stats., sec. 4509; *Railroad Co. v. Spalding*, 93 Fed. 280; *Bates v. International Co.*, 84 Fed. 533, 534; *Cushman v. Johnson*, 13 How. Pr. 499; *People v. Meade*, 29 How. Pr. 363; *Real Estate Associates v. San Francisco*, 60 Cal. 227; High on Receivers, secs. 416-418.) Respondent intended to base this action, and did base it, upon section 4329 of the Revised Statutes. At the bottom of page 52 it is stated that the receiver was appointed under a subdivision of "4529." This mistake is, of course, due to the fact already stated, that these few pages were handed to the printer under the haste of the moment, and printed in the brief without having been read, and that section "4529" should have read "4329."

QUARLES, J.—The record in this case is very voluminous, and covers 621 printed pages. The facts necessary to be noticed are, briefly, as follows: That in 1887 the respondent, Spaulding, commenced an action against the appellant the Coeur D'Alene Railway and Navigation Company to recover upon a claim for construction work upon said appellant's railroad in this state, which action finally resulted in a judgment in favor of the respondent and against said appellant, rendered April 26, 1896, for the sum of \$36,587, which judgment was afterward affirmed by this court on appeal (5 Idaho, 528, 51

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Pac. 408). Upon this judgment an execution was issued against said judgment debtor, Coeur D'Alene Railway and Navigation Company, placed in the hands of the sheriff of Kootenai county, and by said sheriff returned "No property found." Thereafter the said judgment creditor, the respondent, Spaulding, filed, May 3, 1898, in the district court below, his verified petition setting forth said facts, and alleging that the appellants the "Northern Pacific Railroad Company and the Northern Pacific Railway Company have, or claim to have, some interest" in and to the said railroad upon which said construction work was done. The petition contained the following prayer for relief, to wit: "Wherefore your petitioner prays that any and all claims or pretended claims of the said Northern Pacific Railroad Company and the said Northern Pacific Railway Company be declared subsequent, subject, and inferior to the said judgment of your petitioner; that a receiver be appointed by this honorable court to take possession and control of all the properties heretofore described, and to proceed with all due diligence to sell the same, and apply the proceeds of said sale toward the payment of the judgment of your petitioner herein set forth, and for said purpose that the said receiver be directed and empowered, whenever necessary or proper, to manage, operate, and control the steamboats, railroads, and other property in this petition set forth, and to take all steps necessary in the premises, which may from time to time be necessary and proper under the directions and order of this court, and to apply the proceeds arising from the operation or sale of said property to the payment of said debt; and your petitioner prays for such other and further relief as to the court may seem equitable, proper, and just." To this petition the appellants, after notice to them, filed an answer denying many of the affirmative allegations of said petition, and affirmatively alleging facts showing that the Northern Pacific Railway Company asserted and was asserting a claim to said property, and to the title thereof, adversely to the said judgment debtor, the Coeur D'Alene Railway and Navigation Company. The petition and proceedings thereunder were had under the provisions of chapter 2, title 9 of the Code of Civil

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Procedure, covering sections 4504 to 4511 of the Revised Statutes, both inclusive, providing for "proceedings supplementary to the execution," and came on for hearing before the district judge sitting at chambers, and was determined by said district judge at chambers on the twenty-seventh day of July, 1899, who, by order then made, held said property, notwithstanding the adverse claim of the said Northern Pacific Railway Company, subject to the debt of the respondent, and appointing a receiver to take charge of the property and to sell the same, or so much thereof as necessary to satisfy said judgment. From the order appointing a receiver and directing him to subject the said property to the respondent's debt, the appellants moved for a new trial, which was denied, whereupon said appellants appealed from said order denying a new trial, and also from said original order.

The order appealed from is, in effect, a final judgment, which, if valid, settles the rights of the parties, and determines the adverse claim of the appellant the Northern Pacific Railway Company to the property sought to be subjected to respondent's debt against said appellant. There are numerous assignments of error, both in the bill of exceptions and in appellants' brief, touching the rulings of the district judge during the trial, nearly all of which affect the merits of the controversy, but some of them go to the jurisdiction of the district judge to render the decree or order appealed from. Under our view of this case, it is not necessary for us to pass upon the merits of the controversy. Section 4510 of the Revised Statutes is as follows: "If it appears that a person or corporation, alleged to have money or property of the judgment debtor, or to be indebted to him, claims an interest in the money or property adverse to him, or denies the debt, the court or the judge may authorize, by an order made to that effect, the judgment creditor to institute an action against such person or corporation, for the recovery of such interest or debt, and the court, or judge, may, by order, forbid a transfer, or other disposition of such interest or debt, until an action can be commenced and prosecuted to judgment. Such order may be modified or vacated by the judge granting the same, or

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the court in which the action is brought, at any time, upon such terms as may be just." Said section prescribes the duty of the court or judge. If, as in the case at bar, it appears that a person or corporation alleged to have property of the judgment debtor claims an interest in the property adverse to him, "the court or judge may authorize, by an order made to that effect, the judgment creditor to institute an action for the recovery of such interest." This statute is plain, and free from ambiguity. It needs no construction. It prescribes the jurisdiction of the "court or judge," and limits such power to making the orders therein named. We regard the conclusion that the order appealed from is *coram non judice* as inevitable. The judge had no jurisdiction to make it. The question of jurisdiction is never waived, and it was the duty of the district judge to determine his authority to act before assuming to act. His failing to do so, but assuming to act without jurisdiction, does not relieve this court from the duty of determining the question of jurisdiction. That an order of the kind under consideration is void, see the following authorities, *in* wit: *Lindenthal v. Burke*, 2 Idaho, 571, 21 Pac. 419; *McDowell v. Bell*, 86 Cal. 615, 25 Pac. 128; *Lewis v. Chamberlain*, 108 Cal. 525, 41 Pac. 413. We are forced to conclude that the order appealed from, in so far as it affects the adverse claim of the Northern Pacific Railway Company in and to the property claimed by it, and sought to be subjected to respondent's debt, is absolutely void, and that portion of the same appointing a receiver and prescribing his duties is erroneous, as said section 4510 provides for adequate protection to the respondent, and a receiver was unnecessary. Both of the orders appealed from are reversed, and the cause remanded for further proceedings in conformity with the views herein expressed. Costs of appeal awarded to the appellants.

Huston, C. J., and Sullivan, J., concur.

ON REHEARING.

(December 18, 1899.)

SULLIVAN, J.—This is a petition for rehearing. Counsel for respondent urges that the conclusion reached by the court

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was upon the theory that respondent's supplementary proceedings were based upon the provisions of sections 4506-4510, under chapter 2 of the Revised Statutes of 1887, entitled "Proceedings Supplementary to Execution," and contends that that conclusion is error; and it is contended that the proceedings referred to were brought under section 4329, chapter 5, of said Revised Statutes, entitled "Supplementary Proceedings." Counsel admits that, as said sections 4329 and 4510 are supplementary in character, they may be construed together, but that it would be impossible to present a petition to a district judge which would entitle a petitioner to the order contemplated in the petition in this case, or that would entitle him to any relief whatever, as the facts upon which this proceeding was predicated do not show the conditions contemplated under the provisions of said chapter 2. It is also contended that the proceedings passed upon in this case do not in any way involve the discovery of property of the judgment debtor in the hands of a third party, held adversely to such debtor, but that the contention is, the property in controversy came into the hands of Northern Pacific Railroad Company and Northern Pacific Railway Company legally, but that it was purchased with notice of respondent's debt against the property; that said property was purchased under the foreclosure sale by said railroad company *cum onere*, and that the property itself is subject to the debt of the respondent; and that the most important question involved is one of priority of liens, and that such priority cannot be tried or determined by way of the provisions of said chapter 2. This, we believe, sets forth fairly and fully the contention of the respondent. Counsel for the respondent concede that the main question submitted to the judge at chambers was the question of priority of liens, and also urge that the proceedings from which this appeal arose were instituted under the provisions of section 4329 of the Revised Statutes, which section is as follows: "A receiver may be appointed by the court in which an action is pending or has passed to judgment, or by the judge thereof: 1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others

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jointly owning or jointly interested in any property or fund, on the application of the plaintiff or of any party whose right to or interest in the property or fund or the proceeds thereof is probable, and where it is shown that the property or fund is in danger of being lost, removed or materially injured. 2. In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that the condition of the mortgage has not been performed and that the property is probably insufficient to discharge the mortgage debt. 3. After judgment to carry the judgment into effect. 4. After judgment to dispose of the property according to the judgment or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment. 5. In the case when a corporation has been dissolved or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights. 6. In all other cases where receivers have heretofore been appointed by the usages of courts of equity." In the opinion in this case the court held that the original order appealed from was void for the reason that the judge exceeded his jurisdiction in making said order, and that his jurisdiction was limited to making the orders provided for by section 4510 of the Revised Statutes. In a careful consideration of the petition for a rehearing, we find no reason to change our views as therein expressed in regard to the provisions of that section of the Revised Statutes.

The petition in this matter sets forth the facts that an execution had been issued in the original case, and returned *nulla bona*. Also, that by reason of a pretended sale, the exact nature of which the petitioner was not able to state, said Coeur D'Alene Railway and Navigation Company attempted to sell the property in question to the Northern Pacific Railroad Company, and that said last-named company now claims to be the owner of all of said property, and that whatever interest said company has in and to said property is subordinate and inferior to the rights of the petitioner. Petitioner prays that the claims

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and interest of said Northern Pacific Railroad Company and the Northern Pacific Railway Company be declared subsequent, subject, and inferior to the said judgment of the petitioner. Evidently said petition was framed with a view of asking relief in aid of execution. Subdivision 4 of section 4329 provides for the appointment of a receiver in proceedings in aid of execution when an execution has been returned unsatisfied. Said section does not prescribe the proceedings necessary to be had in such cases. In order, then, to ascertain the necessary proceedings to be had in such cases, we turn to title 9, chapter 2 of the Revised Statutes, entitled "Proceedings Supplementary to the Execution," and there we find rules laid down for the procedure in supplementary proceedings in aid of execution. Subdivision 4, section 4329, and sections 4507-4510, found in said chapter 2, relate to the same subject, and must be construed together. Said section 4329 contains no provisions authorizing the judge at chambers to determine the priority of liens of conflicting claimants, as was done in this case. That section authorizes the judge in certain cases to appoint a receiver; nothing more. Under the provisions of said section 4510, upon certain facts being shown, the judge may authorize the judgment creditor to institute an action, and may forbid the transfer or other disposition of the property or debt involved. That is the extent of the judge's jurisdiction. He cannot proceed, and determine the conflicting claims, as was done in this proceeding. A proper suit must be brought for that purpose. The United States circuit court of appeals, in deciding the question of removal of the case of *Navigation Co. v. Spaulding*, 35 C. C. A. 295, 93 Fed. 280, evidently understood that said petition was to a state court, and to be determined by a court. It holds that a petition to a state court asking the appointment of a receiver in aid of execution, as authorized by a state statute, and that a judgment previously obtained in such court be declared a first lien on property as against others claiming an interest therein, is purely an ancillary proceeding for the enforcement of a judgment, and is not removable. That decision proceeded upon the theory that the application to appoint a receiver and to have the priority of

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lien determined was made to and to be tried by a state court, when, as a fact, said application was directed to the court, but was heard and determined by the judge at chambers. Had a proper suit been brought in court for the purpose of determining the priority of liens, and to have a receiver appointed, and said Northern Pacific Companies made defendants, and brought into court, the court would have had jurisdiction to try such suit, which would have been ancillary and supplemental to that of *Navigation Co. v. Spalding*, 35 C. C. A. 295, 93 Fed. 280. But said proceedings were heard and determined by the judge, and not by the court. The judge at chambers had no jurisdiction to determine in that proceeding the priority of liens as between said judgment creditor and said Pacific Companies. The circuit court of appeals evidently understood (and it is so) that the petition for the appointment of a receiver and for a determination of the priority of liens was to be heard and determined by the district court, and not by the judge at chambers, as was finally done. The court, in the opinion, says: "The same may be said with respect to the petition to the state court to declare a priority in favor of the judgment in the original suit." The state court had jurisdiction to hear and determine that matter, but the district judge did not have such jurisdiction. The whole difficulty in this matter apparently arose out of the fact that the priority of the liens referred to was determined by the district judge, instead of by the court.

Counsel for petitioner contend that whether the question of priority of lien can be heard and determined at chambers by the judge depends altogether upon the construction of the statute, and that construction depends upon whether, under *Bates v. International Co.* (C. C.), 84 Fed. 518, these supplementary statutes may be construed together; and, if so, said section 4509 empowers the judge or referee to order the sale of the property, if he finds the property to be subject to the payment of the debt. That said sections must be construed together in the case at bar we have no doubt, and that the judge or referee may order any money or property of the judgment debtor, not exempt from execution, in the hands of such debtor, or in the hands of any other person, to be ap-

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plied toward the satisfaction of the judgment, where there is no adverse claim to said money or property. But section 4510 must be construed with section 4509 and the other sections of that chapter. Said section provides that if, in the proceedings provided by said sections 4507, 4508 and 4509, it appears to the court or judge that a person or corporation alleged to have property or money of the judgment debtor, or to be indebted to him, claims an interest in the money, or property adverse to the judgment debtor, or denies the debt, the judge may authorize an action against such person or corporation. The judge is not empowered in that proceeding to hear and determine the rights of the parties to the property or money under that state of facts, but may order an action to be brought for that purpose. Counsel for petitioner contends that the judge in said proceeding sat as a chancellor, and had all of the powers of one, and as the court sat as his own chancellor, no report was necessary before making the order determining the priority of liens. The provisions of said section 4510 will not sustain that view, for the reason that the judge's powers in such matters are limited, by the provisions of said section, to making an order to bring an action to determine the rights of the respective parties to the property or money in question. He cannot proceed and try that question sitting as a judge at chambers. The petition for a rehearing is denied.

Huston, C. J., and Quarles, J., concur.

Opinion of the Court—Huston, C. J.

(November 22, 1899.)

POTTER v. TALKINGTON.

[59 Pac. 362.]

JURISDICTION—VOID ORDER—NOTICE.—An order by which a third party a stranger to the suit without his consent is made a party to an agreed case, under the provisions of chapter 2, title 3, of the Revised Statutes of Idaho, is without authority of law and all the proceedings thereunder are *coram non judice*.

(Syllabus by the court.)

APPEAL from District Court, Idaho County.

James E. Babb, for Appellant.

The court below erred in granting permission to file a complaint and issue a summons making the Lewiston National Bank a party defendant. because the proceeding was statutory, and no authority to file such additional complaint is given by statute. (Rev. Stats., secs. 5068-5070.) A judgment cannot be founded on an amended complaint filed without authority. (*Fox v. Cosby*, 2 Call (Va.), 1.)

James W. Reid, for Respondents.

No brief filed.

W. N. Scales, for A. W. Talkington, Respondent, refuses to file brief.

HUSTON, C. J.—For a complete understanding of this case, which is a sort of legal conundrum, it is necessary to state some ancient history. "In the beginning" the Lewiston National Bank brought suit to foreclose a mortgage against Tefft and others. Judgment and decree of foreclosure was made in favor of plaintiff and against defendants. From this judgment and decree, appeal was taken by certain of the defendants. This appeal was dismissed upon motion of respondent. (*Bank v. Tefft*, ante, p. 104, 53 Pac. 271.) A question having arisen in said appeal between the clerk of the court and the appellants as to costs incurred on said appeal, the appealing defendants entered into a stipulation, by which

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they submitted, without action, to the district court, the question involved, which was, in substance, as follows: The appellants, after having prepared their transcript on appeal, submitted the same to the attorney of the respondent for certification or suggestion of amendment. Attorney for respondent refused either to certify or suggest amendments. Attorney for appellants then procured the certification of the clerk, for which that officer made a charge of \$150. The said appellants, in *Potter v. Talkington*, 5 Idaho, 316, 49 Pac. 14, disagreeing with the clerk as to the amount he was authorized to charge for such certification, the parties entered into stipulation or agreement to submit the question involved to the decision of the district court, under the provisions of chapter 2, title 3, part 2, of the Revised Statutes of Idaho, reserving the right of appeal from the decision of said court to either party. The district court rendered a decision thereon, from which decision the said clerk appealed to this court, where the appeal was dismissed. But this court, however, in view of the fact that the question involved the fees of the clerk, announced its views as to the fees chargeable by such officers in cases like that then under consideration, which were in favor of the contentions of said clerk. (See *Potter v. Talkington*, *supra*.) Upon the coming down of the *remittitur* to the district court in said cause, the attorney for the respondents herein procured, without notice to this appellant, an order from the district court authorizing him to make this appellant a party defendant in said agreed or stipulated case, and requiring him to file and serve a complaint upon said appellant, and that he have sixty days within which to file said complaint. The complaint was not filed within the sixty days, but on the sixty-first day after the order was made respondents' attorney did file a complaint therein, and serve same upon the attorney of the appellant. No appearance or answer thereto was made by appellant. On the twenty-ninth day of June, 1898, respondents' attorney entered a motion in said cause "to strike from the files of the action the findings of fact and conclusions of law filed herein on the twenty-seventh day of June, 1898; also to strike from the files of the action, and to have canceled upon the judgment

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docket and recorder's record of Idaho county, state of Idaho, the judgment filed and entered in this action on June 27, 1898"—this being the pretended judgment in the case of *Potter v. Talkington*, from which an appeal was taken by respondents in this case, and which appeal was dismissed by this court. Default of appellant was entered on the fourteenth day of July, 1898, and on the same day judgment was rendered against appellant for the sum of \$150 and interest from date of judgment at the rate of seven per cent per annum until paid. From this judgment this appeal is taken.

The order of the district court permitting the appellant to be made a party, without its consent, to an agreed or stipulated case, under the provisions of chapter 2, title 3, part 2, of the Revised Statutes, to which the appellant was a stranger, was without authority of law, and all proceedings thereunder were *coram non judice*. The judgment of the district court is reversed, with costs to appellant.

Quarles and Sullivan, JJ., concur.

(November 23, 1899.)

HAYS v. SIMMONS.

[59 Pac. 182.]

REMOVAL OF PUBLIC OFFICER.—A proceeding for the removal of an officer under section 7459 of the Revised Statutes, is not required to be brought by indictment or information by the public prosecutor: *Rankin v. Jauman*, 4 Idaho, 53, 394, 36 Pac. 503, 39 Pac. 111, affirmed.

(Syllabus by the court.)

APPEAL from District Court, Shoshone County

Patrick Reddy, F. C. Robertson and Jones & Morphy, for Appellant.

Section 7459 is essentially penal, and provides for a criminal proceeding. (*Fitch v. Board of Supervisors etc.*, 122 Cal. 285, 54 Pac. 901.) In the case of *Kilburn v. Law*, 111 Cal. 237, 43

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Pac. 615, the supreme court of California, without a dissenting voice, held distinctly that proceedings under section 772 of the Penal Code of California, which is identical with section 7459 of the Penal Code of Idaho, was a penal statute, and the proceedings thereunder were of a criminal nature. Section 8, article 1 of the constitution of Idaho reads as follows: "No person shall be held to answer for any felony or criminal offense of any grade unless on presentment or indictment of a grand jury, or on information of the public prosecutor after a commitment by a magistrate, except in cases of impeachment." This is exclusive, and no other procedure is allowed for the punishment of crime in this state, and it is directly contrary to the procedure prescribed in section 7459. Whether a crime was committed and what court had jurisdiction, or under what provision of the Penal Code the proceedings were to be had, is to be determined from the facts alleged in the complaint, and not from the statement of the pleader. (*Rankin v. Jauman*, 4 Idaho, 53, 36 Pac. 503.) The complaint shows that the proceedings should have been under section 7445 of the Penal Code. (*Crossman v. Leshner*, 97 Cal. 382, 32 Pac. 449.) The section referred to contemplates and expressly requires that the information must be under oath, and must allege that the party charged has been guilty. If a public officer may be accused and assailed upon the information and belief of any person, he has no protection in the law. Allegations on information and belief are too ambiguous and uncertain to be made the basis of a charge against any person. (See *In re Hotchkiss*, 58 Cal. 39.)

J. H. Hawley, W. E. Borah and J. H. Forney, for Respondent.

A party need not be guilty of crime in order to lay a sufficient basis for his removal as a public officer. His offense may consist of nothing more than a failure to perform the duties of the office; still he may be removed. On the other hand, his conduct may be such as to constitute crime, such as extortion, and for this he may be removed and also convicted of a crime and sent to the penitentiary, or he may be removed

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and not prosecuted at all. The object, therefore, of the statute is simply to rid the public of incompetent and unfaithful officers. But it seems to us that every feature of this question has been settled, not only by the decisions in California, but by the decision of our own supreme court. Since the adoption of the constitution this statute has been before the supreme court, and the supreme court has held it constitutional, and has passed expressly upon the particular point raised by the appellants' brief. (*Rankin v. Jauman*, 4 Idaho, 53, 36 Pac. 503; *Rankin v. Jauman*, 4 Idaho, 394, 39 Pac. 1111.) This same statute has long been upon the statute books of California, and repeatedly upheld and construed, but at all times adversely to the views of the learned counsel for appellants. (*In re Marks*, 45 Cal. 199; *Triplett v. Munter*, 50 Cal. 644; *Smith v. Ling*, 68 Cal. 324, 9 Pac. 171; *Fraser v. Alexander*, 75 Cal. 147, 16 Pac. 757; *Woods v. Varnum*, 83 Cal. 46, 23 Pac. 137; *In re Stow*, 98 Cal. 587, 33 Pac. 490; *Woods v. Varnum*, 85 Cal. 639, 24 Pac. 843; *Crossman v. Leshner*, 97 Cal. 383, 32 Pac. 449; *State v. Cannon*, 47 La. Ann. 278, 16 South. 672.) The charge under this section of the statute may be a written charge by private persons, and need not be by indictment or information in the name of the people. (*Woods v. Varnum*, 85 Cal. 639, 24 Pac. 843.)

Per CURIAM.—The principal contention upon which appellants seek a reversal is that the appellants were not prosecuted by indictment or information filed by the public prosecutor. This contention and all the other points raised by appellants in this appeal were considered and passed upon by this court in the case of *Rankin v. Jauman*, 4 Idaho, 53, 394, 36 Pac. 503, and 39 Pac. 1111. Upon authority of those cases the judgment of the district court in this case is affirmed, with costs to respondent.

Argument for Appellant.

(November 23, 1899.)

HAYS v. YOUNG, SHERIFF.

[59 Pac. 1113.]

APPEAL from District Court, Shoshone County.

Same attorneys and same briefs as in case of *Hays v. Simmons*, ante, p. 651.

Per CURIAM.—The questions in this case being identical with those in the case of *Hays v. Simmons*, ante, p. 651, 59 Pac. 182, by agreement of counsel the cases were argued together, and the same judgment will be entered in this case as in the case of *Hays v. Simmons*. The judgment of the district court is affirmed, with costs to respondent.

(November 24, 1899.)

BOWEN v. HARPER.

[59 Pac. 179.]

SERVICE OF SUMMONS OUT OF THE STATE—DEFAULT—VOID JUDGMENT.—When, after order for publication of summons against an absent defendant has been duly made, the summons is personally served on such absent defendant out of the state, such service does not become complete until the expiration of the time prescribed in the order for publication; and where such order prescribed one month for such publication, as in the case at bar, the defendant served out of the state has one month and forty days in which to answer and a default judgment entered against him during said time is void and will be reversed on appeal.

(Syllabus by the court.)

APPEAL from District Court, Elmore County.

W. C. Howie, for Appellant.

The default of John E. Harper in this cause was improperly entered. The service of the summons was not complete until one month after service on John E. Harper on March 21, 1898,

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and Harper had forty days after that to answer, or all of April 30th. (Rev. Stats., sec. 4146; *Abrahams v. Mitchell*, 8 Abb. Pr. 123; *Fiske v. Anderson*, 12 Abb. Pr. 8; *Brooklyn Trust Co. v. Bukmer*, 49 N. Y. 84; *Market Nat. Bank v. Pacific Nat. Bank*, 89 N. Y. 397; *Tomlinson v. Van Vechten*, 6 How. Pr. 199; *Grewell v. Henderson*, 5 Cal. 465.) John E. Harper not being in default, a judgment against him by default is void. (*Morton v. Morton*, 16 Colo. 358, 27 Pac. 718; *Gibson v. Smith*, 1 Colo. 7; *Grewell v. Henderson*, 5 Cal. 465.)

Wyman & Wyman, for Respondent, cite no authorities on the point not decided by appellant's counsel.

QUARLES, J.—The plaintiff commenced this action in the court below to foreclose a mortgage. Two of the defendants were served with summons in this state; one John E. Harper, the principal defendant, being absent. Order for publication of summons against said absent defendant, Harper, was duly made February 10, 1898. In lieu of publication of the summons, the plaintiff caused the summons and copy of complaint to be served upon said defendant, Harper, personally on the twenty-first day of February, 1898, in the city of Chicago, in the state of Illinois. The default of said defendant, Harper, was entered by the clerk in the action on April 19, 1898. April 25, 1898, said defendant, Harper, filed a motion to set said default aside, upon the ground that the same was entered before the time of said defendant to answer had expired, and thereafter filed a demurrer to the complaint. On May 5, 1898, said motion came on to be heard, and was denied; and on the same day, on evidence heard on behalf of the plaintiff, the court entered its decree of foreclosure in favor of the plaintiff.

The principal question before us is, Was the default of the absent defendant prematurely entered? If so, the court below should have granted said defendant's motion to set the default aside, and its failure so to do was reversible error. The solution of this question depends upon the construction to be given to section 4146 of the Revised Statutes, which section is as follows: "The order must direct the publication to be made in

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a newspaper to be designated as the most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once a week; but publication against a defendant residing out of the territory or absent therefrom must not be less than one month. In case of publication, where the residence of a nonresident or absent defendant is known, the court or judge must direct a copy of the summons and complaint to be forthwith deposited in the postoffice, directed to the person to be served at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint out of the territory is equivalent to publication and deposit in the postoffice; and in either case the service of the summons is complete at the expiration of the time prescribed by the order for publication." A careful examination of this statute convinces us that the legislature intended that the service, when made personally out of the state, should not be regarded as complete until the expiration of the time prescribed for the publication in the order therefor. The order for publication in the case at bar prescribed one month as the time during which the summons should be published in the newspaper designated in the order. The month would necessarily commence with the first publication, if the service had been made by publication. The first publication in such case would be the date, and the only date, from which to compute the one month. It would not do to commence to compute it from the date of the order, for the statute says that the service becomes complete with the expiration of the time prescribed by the order. The qualifying words, "in either case," in the last clause of the statute under consideration relate to both of the modes of serving the summons upon the absent defendant provided for in said statute—i. e., in case of publication of the summons and in case of personal service out of the state. In the first case, the service becomes complete at the expiration of the time prescribed in the order for publication, computing from the date of the first publication; and in the last case it becomes complete at the expiration of such time, computing from the date of making the personal service out of the state. In the case at bar the personal service was made out of the state on

Points decided.

the twenty-first day of February. The service, under the statute, was not complete until the expiration of one month from February 21st. In other words, it required the lapse of time—one month—to complete the service. The defendant had forty days from the time the service became complete in which to answer. The service did not become complete prior to the commencement of the twenty-first day of March. From March 21st to April 19th is less than forty days. Hence, we are bound to hold that the default of the defendant, Harper, was prematurely entered and void, and that the same should have been set aside, and said defendant heard upon the demurrer. See authorities construing the same statutory provision as follows: *Grewell v. Henderson*, 5 Cal. 465; *Trust Co. v. Bulmer* 49 N. Y. 84; *Market Nat. Bank of New York v. Pacific Nat. Bank of New York*, 89 N. Y. 397. The judgment appealed from is reversed, and the cause remanded to the district court for further proceedings consistent with this opinion. Costs of appeal awarded to the appellant.

Huston, C. J., and Sullivan, J., concur.

(November 27, 1899.)

IN RE PAUL CORCORAN.

[59 Pac. 18.]

HABEAS CORPUS—GRAND JURY.—In an application for a writ of *habeas corpus*, the matter of the drawing, summoning and impaneling of the grand jury, which found indictment under which the petitioner was convicted, are not proper matters for consideration, such questions being subject to review only on appeal or writ of error.

SAME.—In this case the objections raised to the legality of the grand jury examined and held to be untenable.

CRIMINAL LAW—SECTION 8500 OF THE REVISED STATUTES NOT REPEALED.—The provisions of section 8500 of the Revised Statutes, providing for the sentence of persons convicted of crimes punishable by imprisonment in the state penitentiary has not been repealed or modified by subsequent legislation.

(Syllabus by the court.)

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Argument for the State.

Original proceeding in supreme court. Application for writ of *habeas corpus*.

P. Reddy and Alfred A. Fraser, for Petitioner.

The judgment in this case is void, for the reason that in addition to the punishment provided by law for the offense, he was sentenced to seventeen years at hard labor. A judgment in excess of that provided by law is absolutely void. (*Ex parte Cox*, 3 Idaho, 530, 32 Pac. 197; *Ex parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. Rep. 152; *People v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211; *Ex parte Bernert*, 62 Cal. 524; *Ex parte Lange*, 18 Wall. 163; *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. Rep. 935; *Ex parte Page*, 49 Mo. 291; *Ex parte Nielsen*, 131 U. S. 176, 9 Sup. Ct. Rep. 672.)

S. H. Hays, Attorney General, W. E. Borah, Hawley & Puckett and J. H. Forney, for the State.

Under provisions of section 3961 the court may, for good cause, discharge regularly drawn and summoned jurors, and order open venire for jurors to try the cause at the term for which jurors were regularly drawn. (*Simmons v. Cunningham*, 4 Idaho, 426, 39 Pac. 1109.) To the same effect are the following authorities: *People v. Durrant*, 116 Cal. 179, 48 Pac. 75; *Babcock v. People*, 13 Colo. 515, 22 Pac. 817; *Chartz v. Territory* (Ariz.), 32 Pac. 166; *Macky v. People*, 2 Colo. 13; *State v. King*, 9 Mont. 445, 24 Pac. 265. We think the provision of the statute directing the ordering of the grand jury by the court, although it contains the word "must," is simply directory to the court, and if for any reason it is not done, the other provision of the statute may be followed. (*State v. Krug*, 12 Wash. 288, 41 Pac. 127; *Weeks v. State*, 31 Miss. 490; *Johnson v. State*, 33 Miss. 363; *State v. Smith*, 67 Me. 328.) The errors claimed, even if they existed, were not jurisdictional, and mere errors and irregularities will not be inquired into on a hearing of this kind. Errors in summoning a grand jury will not be considered on *habeas corpus*. (*In re Betts*, 36 Neb. 282, 54 N. W. 524; *Ex parte Warris*, 28 Fla. 371, 9 South. 718; *Ex parte Springer*, 1 Utah, 214.) The grand jury was at least a *de facto* body, and its

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acts cannot be questioned here. (*State v. Noyes*, 87 Wis. 340, 41 Am. St. Rep. 45, 58 N. W. 386, 27 L. R. A. 776; *State v. Marsh*, 13 Kan. 596; *Sage v. State*, 127 Ind. 15, 26 N. E. 667; *In re Gannon*, 69 Cal. 541, 11 Pac. 240; *State v. Belvel*, 89 Iowa, 405, 56 N. W. 545; *People v. Reigel*, 120 Mich. 78, 78 N. W. 1017; *Ex parte Twohig*, 13 Nev. 302; *State v. Petrea*, 92 N. Y. 128.) Assuming that the judgment is erroneous as to the provision for hard labor, still it can only be corrected upon a writ of error, and in no event is the defendant entitled to a release under a writ of *habeas corpus*. (*United States v. Pridgeon*, 153 U. S. 631, 14 Sup. Ct. Rep. 746; *Ex parte Bond*, 9 S. C. 80, 30 Am. Rep. 20; Church on Habeas Corpus, sec. 372.) It is held that, although the court might have rendered an erroneous judgment, such as imposing hard labor, when not allowed, or rendered a severer sentence than allowed, still these things must be corrected by an appeal or writ of error, and cannot be considered on a writ of *habeas corpus*. (*In re Graham*, 74 Wis. 450, 17 Am. St. Rep. 174, 43 N. W. 148; *Sennott's Case*, 146 Mass. 489, 4 Am. St. Rep. 344, 16 N. E. 448; *Ex parte Ryan*, 17 Nev. 139, 28 Pac. 1040; *In re Swan*, 150 U. S. 637, 14 Sup. Ct. Rep. 225; *Ex parte Gibson*, 89 Ala. 174, 7 South. 833; Church on Habeas Corpus, sec. 372; *In re Paschal*, 56 Kan. 123, 42 Pac. 373; *Ex parte Max*, 44 Cal. 579; *State v. Sloan*, 65 Wis. 647, 27 N. W. 616; *People v. Jacobs*, 66 N. Y. 8; *Ex parte Gibson*, 31 Cal. 628, 91 Am. Dec. 546; *People v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211; *People v. Kelley*, 97 N. Y. 213; *Elsner v. Shrigley*, 80 Iowa, 30, 45 N. W. 393; *Ex parte Lange*, 18 Wall. 163; *In re Graham*, 138 U. S. 461, 11 Sup. Ct. Rep. 363; *In re Taylor*, 7 S. Dak. 382, 58 Am. St. Rep. 843, 64 N. W. 253; *Ex parte Arras*, 78 Cal. 304, 20 Pac. 683.)

HUSTON, C. J.—The petitioner was convicted of murder in the second degree, and sentenced to confinement in the state penitentiary at hard labor for the period of seventeen years. Application is made for a writ of *habeas corpus*, which application is based upon several grounds. The jumbled, incoherent, and repetitive manner in which the grounds upon which the writ is asked are stated in the briefs of counsel for the petitioner renders it somewhat difficult to treat or consider them

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seriatim. We will therefore consider them as they appear to us in the briefs of counsel.

The primary contention is, as set forth in the principal brief, "that the judgment and sentence is void, because the court never acquired jurisdiction of the person of defendant, or of the offense set forth in the judgment and commitment"; and this, because, as is contended, the grand jury which found the indictment upon which the petitioner was tried and convicted was not summoned and impaneled as required by law. In support of this position, petitioner's counsel set forth the proceedings of the court in the matter of summoning the grand jury, as the same appears in the record, which is as follows:

"In the Matter of Drawing and Summoning a Grand Jury."

"It satisfactorily appearing to the court that a grand jury will be required at this term of court, and that the same has not been drawn or summoned to attend, it is therefore ordered that the coroner, and acting sheriff of said county summon, as provided by law, twenty good and lawful men of this county to be and appear at the courthouse of said county, at Wallace, at 2 o'clock P. M., on June 12, A. D. 1899.

"Done in open court, this eighth day of June, A. D. 1899.

(Signed) "GEORGE H. STEWART,
"Judge."

It should be stated *in limine* that it is shown, both by the return to the writ of *habeas corpus* herein, as well as by public records, of which we take judicial notice, that at the general election held in November, 1898, the county seat of Shoshone county was, by vote of the qualified electors of said county, changed from the town of Murray, to the town of Wallace, and that the jury, which counsel for petitioner claims had already been drawn, was drawn at the town of Murray, after such removal of the county seat to the town of Wallace. The law provides that the jury shall be drawn at the office of the clerk, which is required to be kept at the county seat, and, the law not having been complied with in the drawing of such jury, the statement of the district judge in his order that no jury had been drawn was entirely correct. It is contended by counsel

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for the petitioner that "the court had no power or authority to make such order, and it was therefore null and void."

Section 3952 of the Revised Statutes, as the same stood prior to the amendatory act of February 7, 1899 (see Idaho Sess. Laws, 1899, p. 335), was as follows: "Not less than fifteen nor more than thirty days before the commencement of any term of the district court, the judge thereof, if a jury will be required therefor, must make and file with the clerk an order that one be drawn. The number to be drawn must be fixed in the order; if to form a grand jury, it must be twenty, and if a trial jury, such number as the judge may direct." By the amendatory act referred to, said section was made to read as follows: "The district court or the judge thereof, if a jury will be required at any term of the district court, must make and file with the clerk an order that one be drawn. The number to be drawn must be fixed in the order; if to form a grand jury, it must be twenty, and if a trial jury, such number as the judge may direct." It will be seen that the only change made in the section by this amendment is the elimination therefrom of the time within which such order must be made, to wit: "Not less than fifteen nor more than thirty days before the commencement of any term of the district court." The purpose and intent of the legislature in the enactment of this amendment is palpable, and yet counsel for petitioner most vehemently contends that this amendatory act repealed section 3961 of the Revised Statutes. This latter section is as follows: "Sec. 3961. Whenever jurors are not drawn and summoned to attend any court of record, or a sufficient number of jurors fail to appear, such court may, in its discretion, order a sufficient number to be drawn and summoned to attend such court; or it may, by order entered on its minutes, direct the sheriff of the county to summon so many good and lawful men of his county to serve as jurors as the case may require. And in either case such jurors must be summoned in the manner provided by the preceding section." This contention of counsel rests entirely upon the assumption that section 2 of the amendatory act provides that "all acts and parts of acts in conflict with this act are hereby repealed," and that the provisions of section 3961 are

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in conflict with section 3952 as amended. It will hardly be contended, we apprehend, that there was any conflict between section 3952 and section 3961 before the amendatory act was passed, and how the amendment, which consists solely of striking out from said section of the time within which the order of the court directing the drawing of the jury should be made, can create a conflict is entirely beyond our comprehension.

This whole question was before this court in the case of *Simmons v. Cunningham*, 4 Idaho, 426, 39 Pac. 1109; and the action of the district court in that case was sustained. The conditions existing in Shoshone county at the time of the trial in *Simmons v. Cunningham*; or at the commencement of the term at which said trial was had, were, only in a lesser degree, the same as existed at the opening of the term at which the petitioner was tried and convicted; and the court, upon petition of the bar of Shoshone county, adjourned the term from July 7th to July 16th, and discharged all jurors theretofore drawn for such term. On the convening of the court; on July 16th, a venire was issued, as provided in section 3961, and this action of the district court was affirmed by this court. In the case at bar a much more serious condition of affairs existed. For a period of some eight years the organization known as the "Miners' Union" had had almost absolute control of the affairs of Shoshone county; the election of all officers of the county had been controlled by that organization; all business was subject to their domination and dictation; crimes of the most heinous character had been committed with impunity; and so intimidated had been the law-abiding portion of the county, who were vastly in the minority, that any investigation of such crimes was practically impossible. That this condition of things had existed from 1892 is matter of history. It is also matter of history that on April 29, 1899, a mob of something about one thousand in numbers, composed of members of the organization known as the "Miners' Union," and many of whom were masked, coming from the various mining camps in said county, overpowering the railroad employees, came by train to Wardner Junction, in said county, destroyed several hundred thousand dollars of property, and committed two mur-

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ders. The county commissioners, the sheriff, and the prosecuting attorney of said county were notoriously known to be, if not members of said organization, openly in sympathy with them. On May 4, 1899, such was the condition of things in said Shoshone county, by reason of the unlawful, treasonable, and murderous acts of said organization known as the "Miners' Union," and the members thereof, that the governor of Idaho issued his proclamation, declaring said Shoshone county in a state of insurrection, and calling upon the federal government for aid in the maintenance of the law therein. At the convening of the district court in said Shoshone county, on the eighth day of June, 1899, the district judge found the officers of said county heretofore named under arrest by the military authorities. It is for one of the murders committed by said mob on the twenty-ninth day of April, 1899, that the petitioner was indicted and convicted. Under the conditions above described, the district court ordered a jury to be summoned under the provisions of section 3961 of the Revised Statutes, and this action of the district court we consider legal, proper, and highly commendable. We might have disposed of so much of this case upon the ground that none of these questions involving the drawing, summoning, and impaneling of the grand jury are properly inquirable into upon an application for a writ of *habeas corpus*. We have not, however, done so, but have preferred rather to examine the questions raised by counsel for petitioner, notwithstanding what appeared to us their frivolous and utterly untenable character.

It seems to be one of the methods of this organization known as the "Miners' Union," whenever an attempt is made to bring them to account for their unlawful, barbarous, and murderous acts, to at once commence an attack upon the legally constituted authorities who are endeavoring to enforce and maintain the law, and by their false clamor seek to excite sympathy for the malefactors; and such action, by virtue of the recognized "freedom of the press" in this country, always finds an echo, and too frequently indorsement, with that portion of the press whose moral principles are governed and controlled by what is

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for their gain. Thousands of miles from the scene of the transactions they assume to judge and criticise. These "leading journals of civilization" hesitate not, upon no other authority than the lurid reports of their "scoop" friends, based upon the statements of known malefactors and their advocates and defenders, to assail indiscriminately the legally constituted authorities of a community or state for their efforts to maintain the law, and protect persons and property, within their jurisdiction. In keeping with this custom and rule, both the executive and judiciary of the state have been assailed in terms of unmeasured vituperation for simply doing their duty under their oath of office.

We have not attempted to, nor do we deem it essential that we should follow counsel through all the vagaries of a voluminous brief wherein they seek to establish their contention that the grand jury which found the indictment under which the petitioner was convicted was not a legal body. We have shown that said grand jury was a legal body, duly summoned and impaneled under the statutes of Idaho and with that we are, and counsel must be, content.

It is further contended by counsel for petitioner that the judgment and sentence of the district court is void for the reason that it subjects the petitioner to "confinement at hard labor" in the state penitentiary. Section 8500 of the Revised Statutes of Idaho, is as follows: "The penitentiary building erected and conducted by the United States, in the county of Ada, is the territorial prison of the territory of Idaho, wherein must be confined for reformation and punishment, and employed at hard labor, all offenders convicted and sentenced according to law to imprisonment in the territorial prison; and all persons convicted of crime against the laws of this territory and sentenced to confinement in the territorial prison must be sentenced to hard labor during the term of their confinement and must perform such labor under such rules and regulations as may be prescribed by the governor of the territory, the United States marshal and the territorial treasurer; and they may make regulations for working pris-

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oners outside of the prison walls between sunrise and sunset." The first legislature under statehood enacted a law for the government and management of the state penitentiary, the penitentiary building theretofore erected and conducted by the United States having been transferred to the state by the federal government. (See Sess. Laws 1891, p. 21.) The legislature of Idaho, at its session in 1893, amended sections 2 and 15 of the act of the first session (see Sess. Laws, 1893, p. 155); but neither the act of 1891 nor the act of 1893 attempted or did not affect the provisions of section 8500 of the Revised Statutes, in regard to the matter under consideration, nor is there anything in either of those acts which conflicts with the provisions of section 8500 of the Revised Statutes, directing the form of sentence to be passed upon persons convicted of crimes punishable by imprisonment in the state penitentiary, and the same may be said of the amendatory acts of 1899. Those acts do not treat of, or in any way allude to or impinge upon, the provisions of section 8500 of the Revised Statutes, under consideration. The amendment referred to by counsel as having been enacted March 9, 1899, refers to certain sections of the law of 1891 and the acts amendatory thereof, and is as follows:

"Section 1. That section seven (7) of an act entitled 'An act to provide for the government and maintenance of the penitentiary and for the care and custody of state prisoners,' approved February 2, 1899, be amended to read as follows: 'Sec. 7. The board shall have authority to use the labor of the convicts in the erection of a wall around the penitentiary buildings and grounds, and in the construction of irrigating and water ditches for the purpose of bringing water upon said penitentiary grounds as in the opinion of said board may be necessary for the proper cultivation of said grounds and in making such other improvements and repairs to said buildings and grounds as they may deem proper and necessary, and in the performance of any labor in and about or in connection with the said penitentiary and penitentiary grounds or lands or works necessary for the improvement thereof.'

Points decided.

"Sec. 2. All acts and parts of acts in conflict with this act are hereby repealed."

All of this legislation refers to the control, government, and management of the state penitentiary, and to that only; never in the remotest degree alluding to the form of sentence to be inflicted by the court before which a defendant has been convicted. Section 8500 was continued in force by the provisions of the constitution, there being nothing in said section that conflicts with said instrument.

That the court will not, upon an application for a writ of *habeas corpus*, consider the question of drawing, summoning, and impaneling of the grand jury which found the indictment upon which the party was convicted, is, we think, well settled. (*In re McElroy*, 10 Kan. Ap p.348, 58 Pac. 677, and cases there cited.) After a most careful and thorough examination and consideration of the record in this case and of the briefs of counsel, we are unable to find any grounds for the granting of the writ prayed for in the petition, and the same is therefore denied.

Quarles and Sullivan, JJ., concur.

(November 28, 1899.)

CUMMINGS v. STEELE, JUDGE.

[59 Pac. 15.]

CERTIORARI—RECEIVER—NOTICE—VOID ORDER.—After appearance in the action, the defendant is entitled to notice of motion for the appointment of a receiver in the action and an order made by the judge after such appearance, without notice to the defendant, is without jurisdiction and void. *Certiorari* lies to annul an order appointing a receiver which was made on *ex parte* application after appearance of the defendant in the action.

(Syllabus by the court.)

Original proceeding by writ of review.

George W. Tannahill and I. N. Smith, for Plaintiffs.

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Certiorari is the remedy to review appointments of receivers. (*Sweeny v. Mayhew*, ante, p. 455, 56 Pac. 85, cases cited.) The appointment having been made without notice after appearance is void. (Idaho Rev. Stats., sec. 4892; *Larsen v. Winder*, 14 Wash. 109, 53 Am. St. Rep. 864, 44 Pac. 123, cases and citations; *Fischer v. Superior Court*, 110 Cal. 129, 42 Pac. 561, 562.) In Idaho the rules of equity prevail, where no specific provision obtains, and where there is any conflict on the procedure. (Idaho Rev. Stats., sec. 4020.) Therefore, under authorities cited, notice was absolutely necessary and essential to the exercise of jurisdiction. A partnership for a term of years cannot be dissolved merely at will by one party. (1 Parsons on Contracts, 196, 205, at bottom; Parsons on Partnership, 3d ed., 496; *Bradley v. Harkness*, 28 Cal. 69, 78, 1st par.; Story on Partnership, ed. 1841, sec. 276; 1 Story's Equity jurisprudence, Redfield's ed. 1866, sec. 668.)

No brief filed by defendant.

QUARLES, J.—This is a proceeding to review an order appointing one D. H. Haner receiver in an action brought in the district court in and for Nez Perces county by N. S. Soper, plaintiff, against Charles H. Cummings and S. T. Jones, defendants, made by the district judge after the defendants had appeared in the action. The motion for said order was heard, and the order made, without notice to the defendants. The said defendants commenced this proceeding to review said order on the ground that no notice of the application therefor had been given defendants, for which reason the district judge had no jurisdiction to make it. The original action was commenced in the district court, Nez Perces county, July 25, 1899. On August 2, 1899, said defendants appeared in the action, and filed their demurrer, after which, and on April 3, 1899, application *ex parte* was made for the order appointing a receiver, and the receiver appointed without notice to the defendant. The rule in regard to notice in such case is that after appearance such notice must be given, except in case of emergency, when the defendant has absconded, and material injury will result to plaintiff unless

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the order be forthwith made. No such showing was made in the case before us. The order was therefore made without jurisdiction, and therefore void. (See Rev. Stats., secs. 4020, 4892; High on Receivers, secs. 111-117, inclusive; *Larsen v. Winder*, 14 Wash. 109, 53 Am. St. Rep. 864, 44 Pac. 123, and authorities there cited.)

The affidavit of the plaintiff presented and used on the hearing of the motion for the order appointing a receiver ends with the following statement, to wit: "That on this first day of August, 1899, the said defendants, Charles H. Cummings and S. T. Jones, have appeared generally, by their attorney, George W. Tannahill, filing and serving a demurrer to said complaint in said action." The demurrer mentioned had on August 1st been served, but was not filed until August 2d. Notwithstanding the statement in said affidavit above quoted, the district judge in his return herein, says: "Prior to said appointment, to wit, on August 2d, the defendants, by their attorney, George W. Tannahill, filed at Lewiston, Idaho, where said cause was pending, a demurrer to said complaint, of which the said judge had no knowledge at the time of making said order."

For the reasons herein given, the order made by the defendant, as district judge, at chambers, at Moscow, Idaho, on the seventh day of August, 1899, in the action of N. S. Soper, plaintiff, against Charles H. Cummings, et al., defendants, appointing D. H. Haner, receiver, and directing the duties to be performed by the said receiver, should be annulled, and it is so ordered. Costs awarded to plaintiffs.

Huston, C. J., and Sullivan, J., concur.

Argument for Appellant.

(November 7, 1899.)

COUCH v. MONTGOMERY.

[59 Pac. 16.]

CLAIM AND DELIVERY—CHANGE OF POSSESSION.—S. sold and delivered a certain number of cattle to T. After such sale and delivery T. sold and delivered to the defendant eleven head of said cattle; defendant took possession of the cattle so sold to him, and placed them in the custody of his brother. Subsequently, a question having arisen between S. and T. in regard to a balance claimed by S. from T. upon the sale between them, S. without the knowledge or consent of defendant seized and took into his possession the cattle sold by T. to defendant, *held*, that the continuity of defendant's possession having been broken by the unlawful act of plaintiff's vendor, plaintiff cannot invoke the provisions of section 3021 of the Revised Statutes to defeat defendant's title. (Syllabus by the court.)

APPEAL from District Court, Kootenai County.

Charles L. Heitman, for Appellant.

The sale of personalty must not only be accompanied by immediate delivery, but must also be followed by an actual and continued change of possession, to be valid against a subsequent purchaser in good faith. (*Tilson v. Terwilliger*, 56 N. Y. 273; *Harkness v. Smith*, 3 Idaho, 221, 28 Pac. 424; *Dean v. Walkinhorst*, 4 Cal. 78, 28 Pac. 60; *Watson v. Rodgers*, 53 Cal. 401.) There was no difference in the appearance or management or control of the cattle in controversy after the alleged sale by Smith to Traves, or the alleged sale by Traves to respondent, than there was before. The cattle were on Sam Smith's ranch, where they had always been. Smith had exclusive control of them, fed them, sheltered them, claimed them as his own; there were no new brands on them—at least respondent did not put his brand on them; there was absolutely nothing done or said by respondent after about October, 19, 1897, except a futile attempt to prosecute Sam Smith for larceny of the cattle, up to April 19, 1898, to indicate to the outside world that respondent had or made any claim thereto. (*Gallagher v. Williamson*, 23 Cal. 334, 86 Am. Dec. 114; *Woods v. Bugbey*, 29 Cal. 467; *Lay v. Neville*, 25 Cal. 552.) Under section 3021 of the Re-

Argument for Respondent.

vised Statutes of Idaho, the sole inquiry is, Was there "an immediate delivery, followed by an actual and continued change of possession"? (*Harkness v. Smith*, 3 Idaho, 221, 28 Pac. 424; *Bassinger v. Spangler*, 9 Colo. 175, 10 Pac. 809.)

John B. Goode, for Respondent.

There is no contradiction in the evidence that there was an actual, open, notorious and immediate delivery to the respondent, and followed by an actual change of possession at the time and place of the sale and transfer to him. The only question left open is, How long shall the vendee continue in possession and what amounts to a possession of such chattels as cattle; accustomed as they are to run on ranges and liable as they are to be fraudulently taken up and driven off by any trespasser who is actuated *animo furandi*? Certainly the same rule cannot be applied to cattle and such similar property as to small chattels which can be kept in one's domicile or carried upon one's person, and the courts have so held. (*O'Gara v. Lowry*, 5 Mont. 427, 5 Pac. 583; *Bassenger v. Spangler*, 9 Colo. 175, 10 Pac. 809-818.) The word "actual" in the clause of the statute of frauds, referring to a change of possession, was designed to exclude the idea of a more formal change of possession, and the word "continued" to exclude the idea of a merely temporary change. But it never was the design of the statute to give such an extension of meaning to this "continued change of possession" as to require, upon penalty of forfeiture of the goods, that the vendor should never have any control over or use of them. Continuance for all time is not required. (*Godchaux v. Mulford*, 26 Cal. 325, 85 Am. Dec. 178; *Bassenger v. Spangler*, 9 Colo. 175, 10 Pac. 809; *O'Gara v. Lowry*, 5 Mont. 427, 5 Pac. 583; *Parks v. Barney*, 55 Cal. 241; *Humphery v. Harkey*, 29 Cal. 627.) It is not necessary that the purchaser of property shall at all times have exclusive possession of it. He may hire it out to others, or even to the same party from whom he purchased it. (*Ferbrache v. Martin*, 3 Idaho, 573, 32 Pac. 254; *Murphy v. Braase*, 3 Idaho, 544, 32 Pac. 208; *Williams v. Lerche*, 56 Cal. 333.) It is fundamentally clear that a vendor whose title is derived through theft, trespass, conversion, or

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other unlawful means, can transmit no title to a vendee. (26 Am. & Eng. Ency. of Law, 731, and cases cited.)

HUSTON, C. J.—Plaintiff brought suit against defendant to recover the value of eight head of cattle alleged to have been converted by defendant. Defendant denied ownership or right of possession of plaintiff to the cattle, and averred ownership in himself. The case was tried before the district court, with a jury, and verdict rendered for the defendant. From the judgment entered upon the verdict, and from the order denying plaintiff's motion for a new trial, the plaintiff appeals.

The facts in the case, as they appear from the record, are about as follows: On the twenty-eighth day of September, 1897, one Sam Smith sold to one E. C. Traves a bunch of cattle, for a stipulated price per head. On or about October 10, 1897, sixty-one head of the cattle so sold by Smith to Traves were delivered to Traves at a point on the Kootenai river, as per agreement. After such delivery by Smith to Traves, the defendant purchased eleven head of said cattle, which were segregated from the rest of the cattle purchased by Traves, and driven away by defendant to the premises of his brother, some three or four miles from the place of delivery, and there left by defendant. The balance of the cattle purchased by Traves of Smith were taken by Traves across the river to British Columbia. It would seem that some dispute arose subsequently between Smith and Traves touching the sale between them, and Smith thereupon went and took possession of the eleven head of cattle purchased by defendant of Traves, and drove them to his (Smith's) own ranch, and held them, against the protest and demand of the defendant, until about the last of March or the first of April, 1898, when he sold them to the plaintiff, who took them to British Columbia, where they were replevied by the defendant, and are still held by him. There is no question of the *bona fides* of the purchase either of the plaintiff or defendant; but appellant contends that the sale from Traves to the defendant not having been followed by an immediate delivery and an actual and continued change of possession, such sale was void, as against the plaintiff, under the provisions of section 3021 of

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the Revised Statutes of Idaho. We are not in accord with appellant's construction of the statute. It is evident from the record that after the purchase of the cattle by Traves from Smith, and the delivery of the same to Traves, and the payment therefor by Traves, he (Traves) sold and delivered to respondent eleven head of said cattle, and that respondent paid for them; that there was an actual delivery of the cattle so purchased by respondent; that respondent took the same into his possession, and removed them to the ranch of his brother; that subsequently, and without the knowledge or consent of respondent, Smith took said cattle from the possession of respondent and sold them to plaintiff. Smith could acquire no title by such unlawful act; and to hold that a void title in the vendor could ripen into a good and valid title in the vendee, simply because the vendee was an innocent purchaser for value, is absurd. There was an actual delivery, and the possession of respondent would have been "continuous," but for the unlawful acts of Smith. The statute was not intended to aid or cover frauds, but to prevent fraud. There is not anything in the record showing, nor do we understand it is contended, that there was any privity of interest between Smith and respondent, or that respondent ever acquiesced in or consented to the acts of Smith in taking and holding possession of the cattle. There is some conflict of evidence upon immaterial matters, but the weight of the evidence sustains the facts as we have herein given them; and, the jury having so found, their conclusion will not be disturbed.

There are various and numerous assignments of error by appellant, going to the admission of testimony and the instructions to the jury. We have examined them with considerable care, but we can find nothing in them warranting a reversal. The instructions given by the court we think state the law correctly, and are fully as favorable to appellant as the case would warrant, and we find nothing contradictory therein. Finding no reversible error in the record, the judgment of the district court is affirmed, with costs to respondent.

Quarles and Sullivan, JJ., concur.

Points decided.

ON REHEARING.

(November 28, 1899.)

Per CURIAM.—Appellant has filed a petition for rehearing, which we have carefully examined. We find no question of law or fact in the petition which we did not consider on the hearing. No reason being shown why a rehearing should be granted, the petition therefor is denied.

(November 28, 1899.)

PORTNEUF LODGE No. 20, I. O. O. F. v. WESTERN
LOAN AND SAVINGS COMPANY.

[59 Pac. 362.]

USURIOUS CONTRACTS.—Under the laws of this state an action may be maintained on a usurious contract for the recovery of the principal sum loaned. Such a contract is not void.

SAME—SECTION 1266 OF THE REVISED STATUTES.—KIND OF JUDGMENT TO BE ENTERED UNDER.—The provisions of section 1266 of the Revised Statutes direct the kind of a judgment to be entered in actions on a usurious contract, but does not prescribe any particular action for such contracts.

CORPORATION—ENCUMBERING REAL ESTATE.—Under the provisions of section 2764 of the Revised Statutes a benevolent corporation cannot legally encumber or sell its real property without first obtaining an order for that purpose of the district court of the county in which such real property is situated.

CONTRACTS ULTRA VIRES.—The execution of those usurious or forbidden contracts was not germane or incidental to any powers conferred on said plaintiff corporation by its charter or the laws of this state, but was absolutely prohibited.

CLOUD ON TITLE—CANCELLATION OF MORTGAGE.—Under the facts of this case equity will remove the cloud cast upon the mortgagor's title, it being shown that the mortgagor has paid to the mortgagee the principal sum borrowed and that such contracts were *ultra vires*.

(Syllabus by the court.)

APPEAL from District Court, Bannock County.

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Argument for Respondent.

James W. Eden, for Appellants.

We are aware that such a suit has been before this court in the case of *Stevens v. Home Sav. etc. Assn.*, 5 Idaho, 739, 51 Pac. 779. But there was no demurrer to the complaint in that case, and of course it is not decisive of the points raised by this appeal. It is not our object to question the soundness of the views expressed by this honorable court in the many cases it has decided on the subject of usurious interest contracts, but conceding that this court is right on the subject, we believe that the respondent is not in a position to ask the aid of the law in this case. Contracts for a greater rate of interest than is allowed by law are prohibited because they are considered vicious, and it is not necessary that a penalty be imposed in order to render them illegal. (See *Harvey v. Merrill*, 150 Mass. 1, 15 Am. St. Rep. 159, 22 N. E. 49, 5 L. R. A. 205.) A suit could not be maintained on the original contract except by virtue of section 1266, because it would be in violation of law, all rights and remedies given to violators of sections 1264 and 1265, are named in section 1266, and by that statute each party must be governed. If they have made the bed hard they must lie upon it; it is only the result of their own voluntary action.

Thomas F. Terrell, for Respondent.

Appellants rely upon two assignments of error: 1. The court erred in overruling the demurrer to the complaint; and 2. In sustaining the demurrers to the cross-complaint. It appears, however, from the discussion which follows, that only one error is relied upon, to wit: "We contend that the complaint does not state facts sufficient to constitute a cause of action. No particular defects in the complaint are pointed out more than to say that such an action cannot be maintained; and, no reason or authority is offered to uphold the cross-complaint, no reference being made to it in the argument. It is the recognized rule that if a single cause of action is sufficiently stated in the complaint, this objection (general demurrer) will not lie, or rather this ground of demurrer cannot obtain. (*Carler v. Wann*, ante, p. 556, 57 Pac. 314.) That such an action can be maintained and has been upheld by decisions of this

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court, we call attention to the following cases: *Stevens v. Association*, 5 Idaho, 739, 51 Pac. 779; *Barnes v. Pitts Agri. Works*, ante, p. 259, 55 Pac. 237; *Gamble v. Canadian etc. Mtg. Co.*, ante, p. 202, 55 Pac. 241. And to the following cases under statutes identical to our own: *Walker v. English* 109 Ala. 369, 17 South. 715; *Perkins v. Matteson*, 40 Kan. 165, 19 Pac. 633; *Hall v. Hurd*, 40 Kan. 740, 21 Pac. 585; *Thomas v. Reynolds*, 29 Kan. 304; *Boyes v. Summers*, 46 Neb. 308, 64 N. W. 1066. As to the sufficiency of each of the causes of action set forth in the respondent's complaint, we invite the attention of the court to the case of *Sweet v. Ward*, 43 Kan. 695, 23 Pac. 941, 942. It is conceded that the loan of \$4,000 evidenced by the note and interest coupons "providing for interest upon interest which was not due at the time they were made," as set forth in the plaintiff's first cause of action, has been passed upon by this court in the case of *Vermont Loan etc. Co. v. Hoffman*, 5 Idaho, 376, 49 Pac. 314-318. Such interest coupons are therefore null and void; they are not a legal obligation upon respondent; they cannot be enforced by the courts, and if paid must be credited upon any amount unpaid upon the principal. (*People's Bldg. etc. Ass'n. v. Bessonette* (Tex. Civ. App.), 48 S. W. 52.) This court has held that such stock payments are in fact payments upon the principal. (*Fidelity Sav. Assn. v. Shea*, ante, p. 405, 55 Pac. 1022; *Stevens v. Association*, 5 Idaho, 739, 51 Pac. 779.) The facts stated clearly bring the case within the rule laid down in the following cases: *Stevens v. Association*, 5 Idaho, 739, 51 Pac. 779; *Fidelity Assn. v. Shea*, ante, p. 405, 55 Pac. 1022; *Mills v. Association*, 75 N. C. 292; *Association v. Graham*, 7 Neb. 172. The record calls for a construction of section 2764 of the Revised Statutes. (*Wilder v. Campbell*, 4 Idaho, 695, 43 Pac. 677; *People v. Moore*, 1 Idaho, 662; *Barnitz v. Beverly*, 163 U. S. 118, 16 Sup. Ct. Rep. 1042.) Respondent is a social and benevolent corporation organized and existing under chapter 8, sections 2760-2766 of the Revised Statutes. All power vested in such corporation must be derived from these sections of the statute, for this is its charter. (Reese on Ultra Vires, secs. 9-12; *Chewacla Lime Works v. Dis-*

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makes, 87 Ala. 344, 6 South. 122; *Sherwood v. Alvis*, 83 Ala. 115, 3 Am. St. Rep. 695, 3 South. 307.) The question is, Did the trial court err in refusing to enter a decree canceling the mortgages? We respectfully think it did upon either or both propositions involved in the case, to wit: 1. That each of the mortgages had been fully paid when construed by the decisions of this court; and 2. That neither of the mortgages were executed as required by section 2764 of the Revised Statutes of Idaho. If such mortgages were paid, or were executed in violation of law, in either event they and each of them cast a cloud upon respondent's title, which should be removed by a cancellation of the mortgages, after proper demand in writing. (*Hall v. Hurd*, 40 Kan. 740, 21 Pac. 585, 586; *Crenshaw v. Hedrick*, 19 Tex. Civ. App. 52, 47 S. W. 71; *Stevens v. Building Assn.*, 6 Idaho, 739, 51 Pac. 779; *Sweet v. Ward*, 43 Kan. 695, 23 Pac. 941; *Barnes v. Agricultural Works*, ante, p. 259, 55 Pac. 237; *Steiner v. Ellis* (Ala.), 7 South. 803.) This is true whether the mortgages have been paid or are void for want of legal execution. (*New York Nat. Bldg. etc. Assn. v. Cannon*, 99 Tenn. 344, 41 S. W. 1054-1056; *Hill Estate Co. v. Whittlesey*, 21 Wash. 142, 57 Pac. 345; *Bangs v. Windmill Co.*, 96 Tenn. 361, 34 S. W. 516; *Pershing v. Wolfe*, 6 Colo. App. 410, 40 Pac. 856-859; *Sporer v. Eifler*, 1 Heisk. 636; Story's Equity Jurisprudence, sec. 301.) A warranty deed may be canceled as a cloud on title, though the deed conveys nothing because the description of the land intended to be conveyed is defective. (*Jackson v. Tatebo*, 3 Wash. 456, 28 Pac. 916; *Kittle v. Bellegarde*, 86 Cal. 556, 25 Pac. 55.)

SULLIVAN, J.—This suit was brought by the respondent, the Portneuf Lodge, No. 20, Independent Order of Odd Fellows, a corporation, under the provisions of section 3364 of the Revised Statutes to compel the cancellation or satisfaction of the two mortgages hereinafter referred to, the surrender of the promissory notes secured by said mortgages, and for judgment for \$200, the statutory penalty for failing to enter satisfaction of said mortgages of record. The transcript shows that the appellant, Western Loan and Savings Company, and the respon-

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dent corporation, on the thirty-first day of May, 1893, entered into a contract, by the terms of which appellant loaned the respondent \$4,000, to draw interest at the rate of nine per cent per annum, evidenced by a promissory note, with sixty-nine coupon interest notes attached for thirty dollars each, which coupon note called for interest after maturity at the rate of twelve per cent per annum, and the respondent was to pay appellant \$2,000 premium for the \$4,000 loan. One mortgage was executed to secure the \$4,000 loan, and one to secure the \$2,000 premium. Respondent made numerous payments upon this indebtedness, aggregating the sum of \$4,026, and thereupon demanded the discharge of said mortgage, which demand was refused. The appellant filed a demurrer to the complaint, which was overruled. The appellant then answered, and filed a cross-complaint, to which plaintiff demurred. The decision of the court on the last-mentioned demurrer was withheld, and the cross-complaint considered denied, with the privilege to answer to conform to the proof, and the court proceeded to try the case. Certain witnesses were sworn and testified on behalf of the plaintiff, and no evidence was offered by the defendant; and, after argument by the respective counsel, the cause was submitted to the court. The trial took place on the twelfth day of December, 1898, and on the sixteenth day of that month the plaintiff moved to strike out paragraphs 1 and 2 of the prayer of the complaint, which motion was granted. Counsel for respondent claims that said motion was made on the suggestion of the court. The court then sustained the demurrer to the cross-complaint, and denied the demurrer to the answer, and gave judgment in favor of the plaintiff for the sum of \$102, damages and costs of suit. Both parties appeal from the judgment. The defendant assigns as error the overruling of its demurrer to the complaint and the order sustaining plaintiff's demurrer to the cross-complaint.

The demurrer to the cross-complaint was properly sustained and apparently the appellant (defendant) concedes that to be so, as that point is not presented by its brief nor by the oral argument of its counsel.

Counsel for appellant (defendant) contends that, as the mortgages referred to in the complaint are prohibited by sections

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1264 and 1265 of the Revised Statutes, a court will not grant plaintiff any relief; that the complaint on its face shows that the mortgages referred to were given to secure usurious contracts, and prohibited; and that the plaintiff cannot obtain any relief—cannot maintain an action on said contracts. Bishop on Contracts, section 216, is cited. Said section holds since an express promise, founded on a consideration immoral, illegal, or contrary to public policy is void, the law will not create a contract between its violators. The rule there stated has no application to this case, for the reason that a suit in this state may be maintained upon a usurious contract, and the principal sum loaned recovered. The statute does not make such a contract absolutely void.

It is also contended that the only action authorized in this case is that authorized by section 1266 of the Revised Statutes. That section does not especially authorize any action. It simply directs what judgment must be entered when an action is brought on a contract in which a rate of interest is contracted far greater than authorized by law. This action is not brought on the contract, nor to enforce the payment of the demand secured by said mortgages. It is apparently brought under the provisions of section 3364, to enforce the satisfaction or cancellation of said mortgages, and to recover the penalty mentioned in said section.

Counsel for the respondent (plaintiff) contends that the respondent is a benevolent corporation, and, under the provisions of section 2764 of the Revised Statutes is prohibited from mortgaging its real estate, except upon an order first had and obtained from the district court, and that, as no such order was obtained authorizing said society to execute said mortgages, their execution was *ultra vires*. In reply, the counsel for appellant contend that a corporation cannot receive the benefits of a contract, and then deny its power to make the same; and cite 5 Thompson on Corporations, secs. 6016, 6159, 6160; *Miller v. Insurance Co.*, 92 Tenn. 167, 21 S. W. 39, 20 L. R. A. 765. In section 6016 of Thompson on Corporations, it is stated that the great mass of judicial authority seems to be to the effect that when a private corporation has entered into a contract in

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excess of its granted powers, and has received the fruits or benefits of the contract, and an action is brought against it to enforce the obligation, it is estopped from setting up the defense that it had no power to make it. That, as a general rule, is correct, and well supported by a mass of judicial decisions. In illustration of that rule, the author says, in section 6018: "The simplest illustration of this doctrine will be found in cases where the corporation has acquired money or property by means of a contract in excess of its powers, . . . pleads that it had no power to enter into the contract, and at the same time keeps the money or the property." In the case at bar, the plaintiff has repaid \$4,026 for the \$4,000 borrowed, and has thus returned the money borrowed, and now seeks to clear its property of the cloud said mortgages cast upon it, and damages for the refusal of the defendant corporation to discharge the same. The same author, at section 6159, *supra*, considers the question of how far the principle of estoppel works against corporations in respect to *ultra vires* mortgages. It is there said that corporations will not be permitted to exercise powers that might be hurtful to the public interests beyond those expressly conferred by their charters, but when a corporation has exercised powers germane and incidental to those conferred, and in furtherance of the general objects of the corporation, although the subject of the contract may not be within any definite power given, it will be estopped from denying it had no authority to make such contract. There it is held that corporations will not be permitted to exercise powers that might be hurtful to public interests. Neither will they be permitted to make contracts in direct violation of the laws of the state. In the case at bar, the plaintiff, which is a benevolent corporation, is prohibited from mortgaging its real property without an order from the district court. (See Rev. Stats., sec. 2764.) No order was obtained in the case under consideration, and it is a case in which no order could have been obtained authorizing the plaintiff to make a usurious contract. The district court would not have granted an order to the plaintiff permitting it to execute a contract forbidden by the positive statute of this state, had it applied for such an order. So the execution of said usurious and forbidden contracts

was not a power germane and incidental to those conferred by the charter of said corporation, and was not within any definite power given to it, but was absolutely prohibited. The notes to *Miller v. Insurance Co.*, *supra*, are exhaustive and instructive. That was an action to recover on an insurance policy, and the court holds that a contract of a corporation in excess of its powers cannot be enforced because the corporation has received a benefit under it which *ex aequo et bono* it ought not to retain, but that the remedy was by a suit in disaffirmance and for an accounting. Some very respectable authority holds, when the charter or law prescribes the mode of contracting, it must be strictly pursued, and that all persons are bound to take notice of the limits of corporate power. (Reese on Ultra Vires, secs. 52, 53.)

Counsel for appellant contends that said mortgage contracts are prohibited, and considered, under the laws of this state, vicious, and that, as plaintiff was a party to them, it cannot maintain this or any action on said contracts. This is an action to quiet plaintiff's title to the real property covered by said mortgages and to recover damages. It is said in section 302 of 1 Story's Equity Jurisprudence, that the borrower may maintain a bill to compel the giving up of securities left as collateral security for a usurious debt. *New York etc. Assn. v. Cannon*, 99 Tenn. 344, 41 S. W. 1054, is very similar in some respects to the case at bar. In that case the court held, where a mortgage executed to a foreign building and loan association was illegal and unenforceable, because the association had not complied with the statute prescribing terms upon which such corporations might do business in that state, equity would not remove it as a cloud upon the mortgagor's title, except upon his paying to the association what was justly due, and the amount justly due was the amount actually received by the mortgagor, without interest. We think the prayer of the complaint sufficient to grant a cancellation of said mortgages.

We are of the opinion that, under the facts of this case, plaintiff is not entitled to the penalty demanded, nor to the damages awarded it by the judgment, but is entitled to a decree canceling the mortgages described in the complaint. For the

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foregoing reasons, the judgment is reversed, and the cause remanded to the district court for further proceedings consistent with the views herein expressed; each party to pay its own costs upon appeal.

Huston, C. J., and Quarles, J., concur.

(November 28, 1899.)

SIMPSON v. REMINGTON.

[59 Pac. 360.]

PRACTICE—DEMURRER.—*Held*, that the complaint states a cause of action, and demurrer properly overruled.

PRIMA FACIE CASE—NONSUIT.—When the evidence of the plaintiff establishes a *prima facie* case, motion for nonsuit at close of plaintiff's testimony is properly denied.

DENIAL ON INFORMATION AND BELIEF.—A denial on information and belief of matters of public record is not sufficient.

CONFLICT OF TESTIMONY—GARNISHEE.—Where there is a substantial conflict in the testimony, the verdict of the jury will not be disturbed on appeal.

(Syllabus by the court.)

APPEAL from District Court, Bannock County.

James W. Eden, for Appellant.

Section 4470 of the Revised Statutes, provides that a party may have an execution issued upon a judgment at any time within five years after the entry thereof. We believe it is fatal to the complaint when it fails to allege either that an execution was issued and returned or that the defendant, Tanaker, was insolvent, and that these facts were made known to the court by affidavit or complaint before it made the order of February 5, 1895, allowing this suit. (See *Vordermark v. Wilkinson* 147 Ind. 56, 46 N. E. 336, and cases cited.) Chapter 2, title 9 of the Revised Statutes, under which this suit was brought, is a substitute for a creditor's bill in the old chancery practice. (See *Adams v. Haskett*, 7 Cal. 201; *Pacific Bank v. Robinson*,

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57 Cal. 522, 40 Am. Rep. 120, and note; *McCullough v. Clark*, 41 Cal. 298; *Swift v. Arents*, 4 Cal. 390; 24 Am. & Eng. Ency. of Law, 601.)

S. C. Winters, for Respondent.

This action is brought under section 4309 of the Revised Statutes relative to the issuance and services of attachment and not under the provisions supplemental to execution. Under said section 4309 the garnishee is directly liable to the plaintiff for the amounts of any credits, property or debts in his possession belonging to the attachment debtor until the attachment is disposed of and the judgment is satisfied, and gives the plaintiff a right to sue the garnishee at any time whether the attachment debtor is solvent or insolvent. (*Roberts v. Landecker*, 9 Cal. 262; *Herrlich v. Kaufmann*, 99 Cal. 271, 37 Am. St. Rep. 50, 33 Pac. 857.)

SULLIVAN, J.—This is an action supplemental to execution, and brought, by order of the court, under the provisions of section 4510 of the Revised Statutes; at least, the allegations of the complaint would indicate that it was brought under the provisions of said section. The defendant, who is the appellant here, filed a general demurrer to the complaint, which was overruled. The appellant then answered, and attempted to deny, on information and belief, that the execution mentioned in the second paragraph of the complaint had been returned unsatisfied, and denied the other allegations of the complaint. The suit was tried by the court and a jury, and verdict and judgment returned and entered in favor of the plaintiff for \$540 and costs of suit. This appeal is from the judgment and order denying a new trial.

The appellant assigns as error the overruling of the demurrer to the complaint. After a careful consideration of the complaint, we conclude that it states a cause of action, and that it was not error to overrule the demurrer.

A motion for a nonsuit was made at the close of plaintiff's evidence, and overruled, which overruling is assigned as error. We think plaintiff's evidence makes a *prima facie* case, and the court did not err in denying the motion for nonsuit.

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It is contended by the appellant that this action was brought under the provisions of section 4510 of the Revised Statutes, and is an action supplemental to execution, while the respondent claims that it is an action brought under the provisions of section 4309 of the Revised Statutes. However this may be, the complaint states a cause of action under the provisions of section 4510 of the Revised Statutes. It alleges the issuance of an execution, and its return *nulla bona* and the answer attempts to deny that allegation on information and belief. Such a denial is not permitted, where, by a mere inspection of public records, the defendant may have obtained the knowledge as to whether an execution had been issued and returned. The allegations of the issuance of the execution, and its return *nulla bona*, not being denied by the answer, were admitted and taken as true. This relieved the plaintiff of proving said allegations on the trial.

The overruling of appellant's motion for a new trial is assigned as error, and the point urged is that the evidence is insufficient to justify the verdict. We have examined the evidence with care, and, as the jury is the judge of the credibility of the witnesses and the weight to be given to the evidence, we are not disposed to disturb the verdict. The testimony of the plaintiff appears quite satisfactory, while much of that of the appellant is equivocating, unintelligible, and most unsatisfactory. Facts that the appellant should have known and testified to fairly and squarely he did not recollect or could not remember, and, instead of having his books of account at hand from which to refresh his memory, they were at the city of Tacoma, Washington. A careful examination of the testimony convinces us that the jury arrived at the verdict on the issues before them on conflicting evidence, and, under well-settled rules, we are not authorized to disturb it. The judgment must be sustained, with costs in favor of the respondent.

Huston, C. J., and Quarles, J., concur.

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(November 29, 1899.)

ELLIOTT v. PORTER.

[59 Pac. 360.]

JUDGMENT—CONCLUSIVE OF ALL QUESTIONS INVOLVED.—The judgment of a court of competent jurisdiction, so long as the same is unreversed, is conclusive of all questions involved in the issues, presented by the pleadings and passed upon by the judgment of such court as to parties and privies.

(Syllabus by the court.)

APPEAL from District Court, Nez Perces County.

Eugene O'Neill, for Appellant.

This case having been adjudicated in the probate court as to the ownership of the property involved, the decision of the district court reversing that unappealed adjudication is a readjudication of a former adjudication and is *ex necessitate* wrong. The rule of law, we contend, is the judgment of a court of competent jurisdiction directly upon the point is, as a plea, a bar and as evidence conclusive between the same parties and privies upon the same matter directly in another court. (*Love v. Waltz*, 7 Cal. 250; *Wiese v. San Francisco Musical Soc.*, 82 Cal. 645, 647, 23 Pac. 212; *Bell v. Alleghany County*, 184 Pa. St. 296, 63 Am. St. Rep. 795, 39 Atl. 227 et seq.; *Marsh v. Pier*, 4 Rawle, 273, 26 Am. Dec. 131; *Wann v. McNulty*, 7 Ill. (2 Gilm.) 353, 43 Am. Dec. 58; 9 Ency. of Pl. & Pr. 611, 612; *New Orleans v. Citizens' Bank*, 167 U. S. 388, 17 Sup. Ct. Rep. 905.)

James W. Reid, for Respondent.

The only question at issue is, "Did the court err in submitting the question of former adjudication to the jury?" I submit that it was not error. (9 Ency. of Pl. & Pr. 611; 1 Ency. of Pl. & Pr. 836; 36 Cal. 28; 42 Cal. 371; Winfield's Adjudged Phrases, 533.)

HUSTON, C. J.—In July, 1897, Elliott and Emery, as co-partners, instituted a suit in the probate court of Nez Perces

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county against Al. Lamott and William Ross for the recovery of certain personal property, consisting of one set of double harness and two horses, of the alleged value of \$175. It seems that some time prior to the institution of said suit the plaintiffs and defendants therein had made a contract or agreement wherein and whereby the said defendants agreed "to deliver, in Clearwater river, in 1896, five hundred thousand feet of logs, at three dollars per thousand for common lumber, and five dollars per thousand for clear lumber," and plaintiffs therefore agreed to convey and give title to a team of horses, with harness, called "Pete" and "Barney," said horses and harness being same property described in plaintiff's complaint, as pay for one hundred thousand feet of said lumber agreed to be furnished by the said defendants, the price of said horses and harness being estimated at \$300, and to pay for the balance of said lumber, to wit, four hundred thousand feet, in supplies to be furnished to defendants as required, at the rate of three dollars per thousand feet for common lumber, and five dollars per thousand feet for clear lumber. Separate answers were filed in said cause by both defendants; also cross-complaints and answers to cross-complaints. Upon the issues raised by these numerous pleadings (which seem to have been simply to determine the title to the two horses and harness described in the original complaint, and incidentally the title to one hundred and eighteen thousand feet of lumber claimed to have been delivered by defendants to plaintiffs in payment of said horses and harness), the case was tried by the probate court without a jury. The probate court found as facts; *inter alia*, that the title to the horses and harness was in the plaintiffs; that "the defendants . . . placed on the bank of Clearwater river, at a place called 'Big Island,' one hundred and eighteen thousand feet of logs, by Ross' scale; that these logs were not delivered under the terms of said agreement, and not delivered at all, and remained and are the property of the defendants." As conclusions of law from the facts stated, said probate court found "that the plaintiffs are the owners and entitled to and to retain the possession of the horses and harness described in the plaintiffs' complaint; that the defendants, Al. Lamott and William Ross, are the owners of all the logs cut by

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them, not delivered in the water, but left on the bank of the river"; and entered judgment accordingly, with costs in favor of plaintiffs. Subsequently to the rendition of the judgment by the probate court, the defendant, Porter, purchased of William Ross, one of the defendants in the original action, and who had become the sole owner of the same, the logs in question. Elliott, survivor of the firm of Elliott & Emery, seeks by this action to recover the value of said logs. Having, by the judgment of the probate court, recovered the purchase price of the logs, to wit, the two horses and harness, he now seeks in this action to recover the property which the defendants claimed they had paid as the purchase price of said horses and harness.

The probate court had jurisdiction of the parties and of the subject matter involved in the suit before that court. All of the issues passed upon by the probate court were fairly within the pleadings. No appeal was ever taken from the judgment of the probate court. Its judgment settled every question involved in the case before us. We think the law governing this case is properly and fully declared in *Marsh v. Pier*, 4 Rawle, 273, 26 Am. Dec. 131, as follows: "A judgment of a proper court, being a sentence or conclusion of the law upon the facts contained within the record, puts an end to all further litigation on account of the same matter, and becomes the law of the case, which cannot be changed or altered, even by the consent of the parties, and is not only binding upon them, but upon the courts and juries, ever afterward, as long as it shall remain in force and unreversed." And the court adds in the same case: "A contrary doctrine, as it seems to me, subjects the public peace and quiet to the will or neglect of individuals, and prefers the gratification of the litigious disposition on the part of suitors to the preservation of the public tranquillity and happiness." The judgment of the district court is reversed, and the cause remanded, with instructions to enter judgment for defendant in the district court, costs of the appeal in favor of the appellant.

Sullivan, J., concurs.

QUARLES, J.—I concur in the conclusion reached in this case, but I do not concur in the conclusion that the probate

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court had jurisdiction of the subject matter of the action brought by Elliott & Emery against Lamott and Ross. I seriously doubt that probate courts have jurisdiction, under our constitution, of suits to recover specific personal property. But, in my view, this question is not necessary to a determination of the case at bar, for which reason I will not discuss it. In this case, the defendant, in his answer, sets up the proceedings in the case brought by Elliott & Emery against Lamott and Ross in the probate court, and, as the plaintiff here claims, as surviving partner of Elliott & Emery, he is estopped to claim the property in question by his acts in the case in the said probate court. He cannot at one time disclaim title to that property, and then afterward assert it against the same party or the vendor of the latter. The conclusion reached is correct, but I am inclined to think a wrong reason is given for reaching it. The judgment has been properly reversed.

(December 2, 1899.)

**TWIN SPRINGS PLACER COMPANY v. UPPER BOISE
HYDRAULIC MINING COMPANY.**

[59 Pac. 535.]

NEW TRIAL—CUMULATIVE EVIDENCE.—When newly discovered evidence tends to establish a new or independent fact not testified to at the trial, although its effect be to establish a position sought to be established at such trial, such newly discovered evidence is not cumulative within the meaning of the rule prohibiting the granting of a new trial upon newly discovered cumulative evidence.

SAME—JUDICIAL DISCRETION.—The granting of a new trial is a matter largely within the discretion of the trial court, and an order granting a new trial will not be reversed unless there has been a clear abuse of such discretion in granting it.

(Syllabus by the court.)

APPEAL from District Court, Elmore County.

Heyburn, Price, Heyburn & Doherty and S. L. Tipton, for Appellant.

Argument for Respondent.

To support a motion for a new trial upon the ground of newly discovered evidence, the affidavits filed in support of the motion must show that the evidence is "newly discovered," and that it could not, with reasonable diligence, have been produced at the trial; that such evidence is not cumulative merely; that it is not merely impeaching in character; that reasonable diligence was used in preparing for the trial; and the "newly discovered evidence" must be such as to render a different result probable on retrial. (*Turner v. Morrison*, 11 Cal. 21; *Schellhouse v. Ball*, 29 Cal. 608; *Ferrer v. Home Mut. Ins. Co.*, 47 Cal. 430; *Heath v. Scott*, 65 Cal. 548, 4 Pac. 557, and authorities there cited; *Outcalt v. Johnston*, 9 Colo. App. 519, 49 Pac. 1058; Hayne on New Trial and Appeal, sec. 92; *Pincus v. Puget Sound Brewing Co.*, 18 Wash. 108, 50 Pac. 930; *Harralson v. Barrett*, 99 Cal. 607, 34 Pac. 342; *People v. McCurdy*, 68 Cal. 576, 10 Pac. 207; *Chapin v. Goodell*, 2 Colo. 608.) Evidence which merely multiplies witnesses to any one or more of those facts before investigated, or only adds other circumstances of the same general character, is cumulative, and not ground for a new trial. (Hayne on New Trial and Appeal, sec. 90; *Knuffke v. Knuffe*, 8 Kan. App. 857, 56 Pac. 326; *Marshall v. Mathers*, 103 Ind. 458, 3 N. E. 121; *Kloppenstine v. Hays*, 20 Utah, 45, 57 Pac. 712; *Alabama Midland Ry. Co. v. Johnson*, 123 Ala. 197, 26 South. 160.)

W. H. De Witt, Wood & Wilson, W. C. Howie and W. E. Borah, for Respondent.

We might content ourselves in the first instance by resting this appeal upon the well-established rule, so often indorsed by this court, which is to the effect that a motion for a new trial on the ground of the insufficiency of the evidence to justify the decision of the court and newly discovered evidence, is addressed to the sound legal discretion of the court below, and that on an appeal from an order granting a new trial, the appellate court will not reverse the order, unless it appear that there has been a manifest abuse of discretion. It is exceedingly seldom that an appellate court will disturb the action of the lower court, when such court has manifested its dissatisfaction with its own

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decision by granting a new trial. It is presumed that the court has become dissatisfied with the fairness of the trial or the justice of its decision, and an appellate court will not disturb its ruling. (*Pico v. Cohn*, 67 Cal. 258, 7 Pac. 680; *Pac. Rolling M. Co. v. Telegraph Co.*, 79 Cal. 340, 21 Pac. 840; *Breckenridge v. Croker*, 68 Cal. 403, 9 Pac. 426; *Phelps v. Mining Co.*, 39 Cal. 410; *Pierce v. Schaden*, 55 Cal. 406; *Brossard v. Morgan*, ante, p. 479, 56 Pac. 163.) Casual examination of the record of this case will show that this newly discovered evidence is not cumulative. The test is, Does the newly discovered evidence go to a different point in the establishing of the ultimate proposition? (*Kenezleber v. Wahl*, 92 Cal. 202, 28 Pac. 225.) The fact that the testimony may tend to prove the same issue upon which proof was offered on the trial is not enough to make it cumulative, and whether or not it is cumulative is to be determined from its kind and character rather than from its effect. (*Winfield etc. Assn. v. McMullen*, 59 Kan. 493, 53 Pac. 481; 1 Greenleaf on Evidence, sec. 2; *Flannigan v. Newberg*, 1 Idaho, 78.) The court might have very properly granted a new trial, solely on the ground that the evidence was insufficient to warrant the decision, in that no discovery of mineral was proven as to the Hot Springs claim. There was no evidence whatever tending to prove a discovery and this was necessary. (Lindley on Mines, sec. 437; *Reins v. Murray*, 22 Land Dec. 409.)

QUARLES, J.—The appellant commenced this action in the court below to recover certain placer mining claims. After issue joined, the cause went to trial before the court, both parties having waived a trial by jury, and findings and judgment were made and rendered in favor of the appellant. Thereafter the respondent moved for a new trial upon divers grounds, one of which is that respondent has, since the trial, newly discovered evidence material to its defense, which it could not with reasonable diligence have discovered and produced at the trial. The trial judge, after considering the application and numerous affidavits presented on the motion, granted the motion for a new trial. From the order granting a new trial, the plaintiff appealed.

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The principal fact to which the evidence was directed on the trial was whether or not the annual labor required by act of Congress to be performed annually upon unpatented mining claims had been performed upon the Eureka Bar and Hot Springs claims for the year of 1896. To prove such annual labor, the plaintiff only introduced one witness—C. H. Blazer, who testified that he and his sixteen year old son worked thirteen days each on the Eureka Bar in 1896; that they worked fourteen days each on the Hot Springs claim in 1896; that a day's work was worth four dollars at that time. Said witness also stated that he did not know what the regular wages of miners were at that time and in that locality. This witness also stated that he lived at Nampa, in Canyon county; that the said claims were situated in Elmore county; that they arrived at the claims on September 28, 1896; that they commenced work on the 28th of September, 1896, on the Eureka Bar, and quit work on that claim about October 12th or 13th; that they commenced work on the Hot Springs claim about October 14th, and left for Nampa about November 1st, arriving at Nampa a day or two before the election, it taking about three days to go each way. The evidence of this witness is practically all of the evidence to establish the value of the labor performed upon the said claims in the year of 1896. The defendant, to overcome the evidence of said witness Blazer, introduced a duly certified copy of an affidavit made by said witness in November, 1896, and recorded in the county recorder's office in and for said Elmore county, in words as follows:

"State of Idaho, }
County of Canyon. } ss.

"Before me, the subscribed, personally appeared Charles H. Blazer, who, being first duly sworn, says that at least nine dollars' worth of work or improvements were performed or made upon Eureka Bar placer claim, situated in ——— mining district, county of Elmore, state of Idaho; that such expenditure was made at the expense of Charles H. Blazer and C. E. Higgins, owners of said claim.

(Signature) "C. H. BLAZER.

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“Subscribed and sworn to before me, this — day of November, 1896.

(Signed) “HOWARD E. KING.

“[Notary Seal]

“Notary Public.”

The defendant introduced one A. G. Frazier, who testified that C. H. Blazer arrived at the claims about the 12th or 15th of October; that he saw Blazer there at that time, and that Blazer told him that he came in the night before. E. W. Bassett testified that he was on the claims about the middle of October, 1896, knew the claims, and that no new work had then been done; that the work that had been done was done the year before; that the wages of miners in 1896, in the locality of these claims, was one dollar and fifty cents per day and board. Capt. Huckins testified on behalf of the defendant that Blazer went on the claims about the middle of October, 1896, and left there the latter part of October, 1896. Other witnesses testified in behalf of defendant to the effect that the wages of miners in the locality in 1896 range from one dollars and fifty cents to two dollars and fifty cents per day.

The newly discovered evidence relied upon for a new trial was presented to the trial judge by affidavits made by divers persons, who deposed to facts all tending to show that the evidence of C. H. Blazer before the court on the trial was untrue. The appellant contends that the trial judge erred in granting a new trial, for the reason that the alleged newly discovered evidence is impeaching in character, and merely cumulative to that introduced by respondent at the trial. This contention is largely, but not entirely, correct. Respondent shows that he can prove facts not testified to by any witness at the trial—some of which show that the witness C. H. Blazer was in Nampa on October 2, 1896, and bought a bill of lumber there on that day; some showing that he was in Nampa as late as October 4, 1896; some showing that he borrowed a gun from the house of his mother in law about October 8, 1896, which he took with him to the said mining claims; and other facts which, if not overcome, would show that said witness and his son did not perform, and could not have performed, the work upon said claims as testified to by him. We think that the re-

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spondent made sufficient showing to justify the granting of a new trial. That portion of the newly discovered evidence tending to establish facts not testified to at the trial was not cumulative. In 14 Encyclopedia of Pleading and Practice, 815-817, it is correctly said: "Although evidence is additional to other evidence tending to prove the same position, yet it is not cumulative if it is of a different character, tending to establish the same general result by proof of a new and distinct fact." The granting of a new trial is largely a matter of discretion in the trial court. An appellate court should not reverse an order granting a new trial except in case of a clear abuse of discretion. We have carefully examined the record before us, and do not think that the trial judge abused the discretion vested in him in making the order granting a new trial: wherefore the order appealed from is affirmed. Costs awarded to respondent.

Huston, C. J., and Sullivan, J., concur.

(December 7, 1899.)

WARREN v. STODDART.

[59 Pac. 540.]

BILLS OF EXCEPTIONS—SPECIFICATIONS OF ERROR.—Under the provisions of sections 4426, 4428 and 4430 of the Revised Statutes, a bill of exceptions is not required to contain a specification of the errors relied on, unless the exception is to the verdict or decision upon the ground of the insufficiency of the evidence to sustain it. In that case, the bill of exceptions must specify the particulars in which the evidence is not sufficient.

STATEMENT ON MOTION FOR A NEW TRIAL.—Under the provisions of subdivision 3, section 4441, of the Revised Statutes, a statement on motion for a new trial must specify the particular errors relied on.

WHAT BILL OF EXCEPTIONS MUST CONTAIN.—Under the provisions of section 4427 of the Revised Statutes an order striking out a portion of a pleading is deemed excepted to and when such order, and the papers upon which it is made, are a part of the records and files in the action; it need not be embodied in a bill

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of exceptions, but may be reviewed on appeal as though settled in a bill of exceptions.

ATTORNEY'S FEES.—A stipulation, in a mortgage for an attorney fee, in case of suit brought, is valid, but should be enforced only for a reasonable fee.

SAME—HOW COURT TO DETERMINE WHAT IS A REASONABLE FEE.—

The court, in determining what fee is reasonable, may take into consideration the amount actually paid or agreed to be paid, if any such agreement was entered into, also should take into consideration the importance of the suit, the amount involved, the nature and extent of the work and labor in the preparation and trial of the action and any other facts that would assist the court in arriving at a right conclusion as to what would be a reasonable fee.

SAME—WHEN FEE NOT ALLOWED.—No judgment should be allowed for attorney's fees, unless the attorney has or is entitled to receive it himself. No fee should be allowed of which the plaintiff is to receive a part.

DEFENSES.—*Held*, that the answer set up two separate defenses and that it was error to strike such defenses out.

SAME—TRANSFEREE—ASSIGNOR.—Where a promissory note payable "to order" is transferred without indorsement, the transferee acquires only the equitable title and can only recover subject to the defenses that were available against his assignors.

COVENANTS IN DEED.—The word "grant" when used in a conveyance by which an estate of inheritance is to be passed, is a covenant that the estate so conveyed is at the time of the execution thereof, free from encumbrances done, made or suffered by the grantor or any person claiming under him.

BREACH OF COVENANTS AGAINST ENCUMBRANCE.—There is a clear distinction between breaches of covenants of "warranty" and "quiet and peaceable enjoyment" and breaches of covenants against encumbrances.

SAME—REMEDY.—In cases of this kind the vendee may pay off the encumbrance and recoup the sum so paid against the amount due on the purchase price, but that is not his only remedy, as a defense on the ground of breach of covenant of encumbrance is sufficient to defeat an action for the recovery of the purchase price until such encumbrance be removed.

(Syllabus by the court.)

APPEAL from District Court, Canyon County.

Wyman & Wyman and Hugh E. McElroy, for Appellants.

Plaintiff having alleged title by written assignment from the payee to Simmons and the same being denied, in order to recover he must prove the title he has alleged. (14 Am. &

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Eng. Ency. of Pl. & Pr. 504, note B.) Does the evidence sustain the finding of the court that the sum of \$1,000 was a reasonable attorney's fee for the foreclosure of this mortgage? It is not alleged in the complaint that any expense whatever had been incurred in that behalf, and while plaintiff's witnesses testified that the sum allowed is a reasonable fee, they also testified that so far as they knew plaintiff had not agreed to pay that amount. Attorney's fees are allowed to the mortgagee for the sole purpose of reimbursing him for any reasonable sum he has actually paid or agreed to pay for such services and not as an additional means of speculating on the mortgagee's necessities or misfortunes. If there is an attorney, the plaintiff's expense is limited to the amount paid therefor, provided it is reasonable. (*Broadbent v. Brumback*, 2 Idaho, 366, 16 Pac. 555.) It becomes necessary to determine whether the allegations stricken out constitute a defense to the cause of action alleged in the complaint. By his pleading, plaintiff claims title, not by indorsement, but by assignment. He introduced no proof of indorsement. He only claims to be an assignee and not an innocent purchaser, and whatever rights he may have are subject to any defense which would have been good against the original payee at the time of the assignment. (Daniel on Negotiable Instruments, sec. 741; *Lyon, Potter & Co. v. First Nat. Bank*, 85 Fed. 120, 29 C. O. A. 45; *Harrisburg Trust Co. v. Shufeldt*, 87 Fed. 669; *Gaylord v. Nebraska etc. Bank*, 54 Neb. 104, 69 Am. St. Rep. 705, 74 N. W. 415; Randolph on Commercial Paper, 788.) While a thing once proved to exist continues as long as it is usual with things of that nature, this principle has no application to a statement of facts in a pleading. (*Fredericks v. Tracy*, 98 Cal. 653, 33 Pac. 750.) The officers of a corporation can only execute a deed in its name pursuant to resolution of the board of directors. (*Johnson v. Sage*, 4 Idaho, 758, 44 Pac. 641; *Bliss v. Keweenaw Canal & Irr. Co.*, 65 Cal. 502, 4 Pac. 507.) The owners of canals and ditches are entitled to reasonable compensation for appropriating and delivering said water. (*Syllabus, Witterding v. Green*, 4 Idaho, 773, 45 Pac. 134.) The covenant is not a warranty of title or of "quiet enjoyment against encum-

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brances." It is that there are no encumbrances—that the property is "free from encumbrances." There is a very material difference between the last and either of the other covenants. In the case of the former, there must be some interruption of the possession of the property before there is any breach of the covenant. All the grantor contracts is that the grantee shall have the quiet possession of the thing conveyed and so long as he remains in possession, the contract is not broken. In the case the covenant is that there are no encumbrances, it is clear that the breach occurs whenever the deed is given and that no eviction is necessary. (*Streeper v. Abeln*, 59 Mo. App. 485; *Anderson v. Knox*, 20 Ala. 156; 8 Am. & Eng. Ency. of Law 2d ed., 122; *Kramer v. Carter*, 136 Mass. 504, (507).) It will not be disputed that the vendee may pay off the encumbrance and recoup the sum so paid against the amount due on the purchase price. (*Davis v. Bean*, 114 Mass. 358; *Baker v. Railsback*, 4 Ind. 533; *Stilwell v. Chappell*, 30 Ind. 72; *Nesbitt v. Campbell*, 5 Neb. 429; *Tod v. Gallagher*, 16 Serg. & R. 261, 16 Am. Dec. 571; *Tone v. Wilson*, 81 Ill. 529.) Under these circumstances, the vendor being insolvent, courts of equity will restrain the collection of the purchase price by injunction, where that remedy is sought or, in cases like this, where the mortgage is sought to be foreclosed, will stay the action until that duty has been performed. (*Van Riper v. Williams*, 2 N. J. Eq. 407; *White v. Stretch*, 22 N. J. Eq. 76; *Bank v. Pinner*, 25 N. J. Eq. 495; *Daton v. Dusenburg*, 25 N. J. Eq. 110; *Yonge v. McCormick*, 6 Fla. 368, 63 Am. Dec. 214; *Jaques v. Esler*, 4 N. J. Eq. 461; *Nesbitt v. Campbell*, 5 Neb. 431; *McLemore v. Mabson*, 20 Ala. 137; *Arnold v. Curl*, 18 Ind. 339; *Johnson v. Jones*, 13 Smedes & M. 580; *Foote v. Clark*, 102 Mo. 394, 14 S. W. 981; *Young v. Butler*, 1 Head, 640.) Respondent contends that the action of the court in striking out certain paragraphs of the answer has not been specified as error in the record, although specified in appellant's brief, and therefore cannot be considered. The supreme court of California has repeatedly held that in cases of this character, where evidence is not to be reviewed, the bill of exceptions need not contain specifications of error. (*Miller v. Wade*, 87 Cal. 410, 25 Pac. 487;

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Shadburne v. Daly, 76 Cal. 355, 18 Pac. 403.) Appellants have not appealed from the order striking out part of their answer. That order is not appealable. (Rev. Stats., secs. 4807, 4808; *Gates v. Walker*, 35 Cal. 289.) Where an amended complaint has been filed, the original complaint may be placed in the transcript as part of the judgment-roll to show action not barred by statute of limitations. (*Dougall v. Schulenberg*, 101 Cal. 158, 35 Pac. 635.)

T. J. Jones and A. A. Fraser, for Respondent.

The first error complained of in appellants' brief was the action of the court in striking out paragraphs 6 to 12, inclusive, of appellants' further answer. On this point we contend; 1. That the court cannot consider said assignment of error, as the same is not assigned as error in the record. (*Purdy v. Steel*, 1 Idaho, 216; *Burnett v. Pacheco*, 27 Cal. 408; *Crosett v. Whelan*, 44 Cal. 200; *People ex rel. Dickinson v. Bainard*, 27 Cal. 470.) 2. The order appealed from is not designated in the notice of appeal. (*Williams v. Dennison*, 86 Cal. 430, 25 Pac. 244; *Gates v. Walker*, 35 Cal. 289; *Gruell v. Spooner*, 71 Cal. 493, 12 Pac. 511.) 3. The answer being struck out is no part of the judgment-roll, and as it is not incorporated in the bill of exceptions the court cannot consider the same. (*Commissioners v. Krap*, 90 Ind. 236; *Abbott v. Douglass*, 28 Cal. 299 of the dissenting opinion.) The further answer of the appellants did not state facts sufficient to constitute a defense to this action. The note and mortgage sued upon were given on September 16, 1892, and for a period of over five years the appellant made no objection to said water right deed, nor did he offer to reconvey the same or to place the parties *in statu quo*. (*Caldwell v. Ruddy*, 2 Idaho, 1, 1 Pac. 339; *Bowman v. Ayers*, 2 Idaho, 465, 21 Pac. 405; *Andola v. Picott*, 5 Idaho, 27, 46 Pac. 928; *Williams v. Mitchell*, 87 Cal. 532, 26 Pac. 632.) In order to rescind a contract, it is a well-established rule of equity that a party must do so promptly, or he will be deemed to have waived it. (*Fratt v. Fiske*, 17 Cal. 380; *Barfield v. Price*, 40 Cal. 535; *Cobb v. Hatfield*, 46 N. Y. 533.) And it is too late to offer to reconvey after a suit is commenced. (*Cowen v. Harrington*, 5 Idaho, 329, 48 Pac. 1060; *Rock*

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Island etc. Co. v. Bank of Horton, 9 Kan. App. 96, 57 Pac. 1050; *Kinney v. Osbourne*, 14 Cal. 112; *Burton v. Stewart*, 3 Wend, 239.) Delay in rescission is evidence of a waiver of the misconduct of the other party, and is itself deemed an election to treat the contract as valid and binding. (*Higan v. Kyle*, 7 Wash. 595, 35 Pac. 399; *Scheftel v. Hays*, 58 Fed. 457, 7 C. C. A. 308; *Rugan v. Sabin*, 53 Fed. 415, 3 C. C. A. 578; *McLean v. Clapp*, 141 U. S. 429, 12 Sup. Ct. Rep. 29; *Grumes v. Saunders*, 93 U. S. 55; *Hayward v. Bank*, 96 U. S. 611; 2 Warvell on Vendors, 836.) The consideration of an assignment need not be alleged or proven. (*Brumback v. Oldham*, 1 Idaho, 709.)

SULLIVAN, J.—This action was brought to foreclose a mortgage upon six hundred and forty acres of land situated in Canyon county. The defendants Walling and Davis are merely nominal parties. It is alleged in the complaint that the defendant Stoddart, who is the appellant here, executed and delivered to the Boise City and Nampa Irrigation, Land and Lumber Company, a corporation, on the sixteenth day of September, 1892, a certain promissory note for \$6,400, with a mortgage securing the same; that on April 19, 1894, said corporation assigned said note and mortgage to one Simmons, who thereafter assigned them to the plaintiff—and prays for a decree of foreclosure, and for \$1,000 attorney's fees, and costs. The answer denies both of said assignments, and that either of said assignees were ever holders of, or lawfully in possession of, the said note or mortgage, and denies that any greater sum than \$300 is a reasonable attorney's fee. And for a further defense the answer avers a total failure of consideration, in that the note and mortgage were given as the purchase price of a certain water right described in the mortgage, and for no other consideration; that said water right was never conveyed to defendant Stoddart, although he received a certain deed of conveyance purporting to convey said water right to him; that said deed was void because the officers executing it were not authorized to do so, which fact appellant did not learn until March 25, 1899; that the grantor in said pretended deed did not deliver to appellant possession of any property pursuant thereto; and that appellant

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has not at any time received thereunder any value, benefit, or advantage whatever. Said answer also avers that said deed, by its terms, did not convey a water right, but was a contract for the delivery of water upon payment of an annual maintenance compensation therefor, and conferred upon the appellant no other privilege or property right; that said deed covenanted that the property conveyed by it was free from all encumbrances, while in truth at the time of the giving thereof there was a valid mortgage, amounting to \$200,000, against said water right, which still, remains in full force and effect, of which appellant Stoddart had no knowledge at the time of receiving said deed; that at such time and ever since the property covered by said last-mentioned mortgage was of less value than the amount of the indebtedness secured thereby; that on August 25, 1893, and while the payee (said corporation) in said note and mortgage was still the owner thereof, judgment was recovered against said corporation by Taylor and Satterfield, under which said water right was sold to said Taylor and Satterfield, who thereafter received a sheriff's deed therefor, and on September 15, 1894, went into possession thereof, and that they and their successors ever since have been in possession thereof; that on July 3, 1895, said corporation, by quitclaim deed, conveyed said water right to one R. E. Green, as administrator of the respective estates of said Taylor and Satterfield; and that at all of said times said corporation was insolvent. The answer also avers that said Simmons and the respondent Warren have resided without this state, and that said corporation was at the time of the execution of said note and mortgage, and ever since has been, insolvent, and on August 25, 1893, ceased doing business, and discontinued its organization as a corporation. It is also averred that irreparable injury would result to appellant if respondent recovers a decree of foreclosure. On the motion of respondent's counsel the court struck out all of the affirmative matter set up in the answer. On the trial evidence was introduced as to the respondent's ownership of the note and mortgage, and as to a reasonable attorney's fee. Judgment and decree of foreclosure went in favor of the respondent for \$10,600 damages, interest, and costs, and for \$1,000 attorney's fees. This appeal is from the judgment.

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Several errors are assigned, the chief of which is that the court erred in striking out paragraphs 6 to 12, inclusive, of the answer. It is contended by counsel for respondent that said assigned error cannot be considered, as that error is not assigned in the record. The record shows that paragraphs 6 to 12, inclusive, of the amended answer, were stricken out on motion of respondent's counsel, and that counsel for appellant duly excepted thereto. Said motion, the ruling thereon by the court, and the exceptions of the appellant are embodied in the bill of exceptions contained in the transcript. In appellant's brief the first error specified is as follows: "That the court erred in sustaining plaintiff's motion to strike out paragraphs 6 to 12, inclusive, of defendant Stoddart's answer." Said specification of error is amply sufficient, under paragraph 1, rule 6, of the rules of this court; and said exceptions were duly saved in the bill of exceptions, which bill is properly a part of the judgment-roll, and therefore is properly before this court.

Counsel for respondent cite several cases wherein it is held that a statement on motion for a new trial must specify the particular errors relied on, or it will be disregarded. Those authorities are in accord with subdivision 3, section 4441, of the Revised Statutes, which provides, *inter alia*, that the statement on motion for a new trial shall specify the particular errors upon which the party relies, and, if it does not, such statement shall be disregarded on the hearing of the motion. That provision and the authorities cited do not apply in this case, as no statement on motion for a new trial is involved. Under our statute (sections 4426 to 4433, inclusive, which treat of exceptions and bills of exceptions) there is no requirement that a bill of exceptions shall contain a specification of errors relied on, except when the exception is to the verdict or decision upon the grounds of the insufficiency of the evidence to sustain it, in which case the bill must contain a specification of the particulars in which the evidence is alleged to be insufficient. (See Rev. Stats., sec. 4428.) In no other case is a specification of errors expressly required to be put into a bill of exceptions. It, no doubt, is a good practice to specify the particular errors relied on in a bill of exceptions prepared after trial for the

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purpose of use on a motion for a new trial. The principal difference between a statement on motion for a new trial and a bill of exceptions is this: The former must contain a specification of the errors relied on, or it will be disregarded; and the latter need not contain such specification unless the exception is to the verdict or decision upon the ground of the insufficiency of the evidence to justify it. A statement on motion for a new trial should contain a history of the proceedings at the trial, and all the exceptions taken by the moving party, and a specification of all errors relied on. It is generally more full and complete than a bill of exceptions. It has been held in *Miller v. Wade*, 87 Cal. 410, 25 Pac. 487, and *Shadburne v. Daly*, 76 Cal. 355, 18 Pac. 403, that, when an appeal is taken on a bill of exceptions, errors of law occurring at the trial may be reviewed, although no specifications of particular errors of law relied on are contained in the bill. In the last cited case the court holds that subdivision 3, section 659 of the Code of Civil Procedure, requires a statement of the case to contain specifications of the particular errors relied on, and that is not required in a bill of exceptions. And in *Miller v. Wade, supra*, that case is distinguished. That court has held in a number of cases that a statement and bill of exceptions are the same. For some purposes that is true; but section 4441 of the Revised Statutes, requires every statement on motion for a new trial to contain a specification of the particular errors relied on, and that is not required in a bill of exceptions unless the question of the insufficiency of the evidence is raised by the bill of exceptions.

It is also contended by counsel for respondent that the order striking out said paragraphs of the answer is not designated in the notice of appeal. There is nothing in that contention, as said order was made before judgment, and may be reviewed on an appeal from the judgment. Orders of a court from which the statute makes no specific provision for an appeal may be reviewed on appeal from the judgment or order denying or granting a new trial, and need not be specified in the notice of appeal. (*Gates v. Walker*, 35 Cal. 289.)

It is also contended that the paragraphs of the answer which were stricken out cannot be reviewed on appeal unless they

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were saved in a bill of exceptions; that, as said paragraphs were stricken out, they are no part of the pleadings, and for that reason are no part of the judgment-roll. Subdivision 2, section 4456 of the Revised Statutes, provides, *inter alia*, that the pleadings are a part of the judgment-roll. This court, however, has held that when an amended pleading has been filed, and no question is raised as to the original pleading, the latter must not be put in the transcript. Said amended answer, with all its paragraphs, regardless of some of them having been stricken out, was properly a part of the judgment-roll, and therefore a part of the record on appeal in this case. The question as to whether the action of the trial court in striking out said paragraphs was right is properly before us for decision. (*Abbott v. Douglass*, 28 Cal. 296; *Davis v. Water Co.*, 98 Cal. 417, 33 Pac. 270; *Dougall v. Schulenberg*, 101 Cal. 158, 35 Pac. 635.) The order striking out said paragraphs of the complaint is a nonappealable order, and such orders may be reviewed on appeal from the judgment. (*Gates v. Walker*, 35 Cal. 289.) An order striking out a portion of a pleading is deemed excepted to, and, appearing in the record or files, may be reviewed upon appeal as though settled in a bill of exceptions. (Rev. Stats., sec. 4427.)

The court allowed \$1,000 attorney's fee, and that is assigned as error. The mortgage provides that in case of foreclosure the court may allow a reasonable attorney's fee therefor, and the complaint alleges that \$1,000 is a reasonable fee. To prove said allegation the plaintiff introduced the testimony of two witnesses. After testifying that they were practicing attorneys, they were both asked what would be a reasonable attorney's fee for the foreclosure of said mortgage, and they each replied \$1,000. Each of said attorneys also testified that, so far as he knew, the plaintiff had incurred no expense in the matter of attorney's fees. There is no evidence in the record showing that the plaintiff had paid or agreed to pay his attorneys any sum whatever for the foreclosure of said mortgage, or that he was to receive any compensation therefor. It is the established rule in this state that a stipulation in a mortgage for an allowance for attorney's fee in case of foreclosure is valid, but

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should be enforced only for a reasonable amount. (*Broadbent v. Brumback*, 2 Idaho, 366, 16 Pac. 555.) In that case it is held, in determining what sum is reasonable, that the court should allow no more than is actually received or contracted for by the attorney for his services, under any circumstances, and must not allow that sum unless it is reasonable. If the plaintiff has paid or contracted with his attorney for an agreed fee, he is entitled to recover that sum, provided it is reasonable. If, however, the amount of the attorney's fee was not agreed upon, that fact must be shown; and the plaintiff would then be entitled to recover the reasonable value of the services rendered, to be fixed by the court on proper testimony. In order to intelligently determine the reasonable value of services, the services performed must be shown. In the case at bar there is no testimony showing the nature, extent, or value of the services performed. And when the witnesses testified that \$1,000 was a reasonable fee, so far as the record shows, they had no facts upon which to base their opinion. So far as the record shows, we think that \$1,000 was greatly in excess of the value of the services rendered. In *Bank v. Treadwell*, 55 Cal. 379, the court holds that the plaintiff was not entitled to a judgment for attorney's fees, except for such sum as it had paid or had become liable to pay to its attorney. In that case the attorney for the plaintiff was regularly employed by plaintiff, and received for all of his services ten dollars per month, and no more; and it is held that plaintiff was not entitled to judgment for such fee unless the attorney was entitled to receive it himself. We think that the correct rule.

The most important question in the case is whether the court erred in striking out paragraphs 6 to 12, inclusive, of the answer. If those paragraphs constituted a defense to the cause of action alleged in the complaint, then the striking of them out was prejudicial error. The plaintiff alleges title to the promissory note and mortgage sued on by assignment, and not by indorsement. He claims only to be an assignee, and not an innocent purchaser, and his rights are subject to any defense which the maker had against the original payee at the time of the assignment. He stands, in that respect, in the shoes of his

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assignor. (1 Daniel on Negotiable Instruments, sec. 741; *Harrisburg Trust Co. v. Shufeldt*, 31 C. C. A. 190, 87 Fed. 669; 2 Randolph on Commercial Paper, sec. 788.) It is alleged in the complaint that the payee in said promissory note assigned and sold said note to one Simmons on the nineteenth day of April, 1894; and it is averred in the tenth paragraph of said answer, which was stricken out by the court, that on or about the twenty-ninth day of August, 1893, said payee corporation wholly ceased doing business and discontinued its organization. That averment only states a conclusion, and is not a sufficient allegation of the dissolution of said corporation. Said paragraphs so stricken out aver a total failure of consideration for said note and mortgage, and also a breach of covenant against encumbrances in the deed, which deed was the consideration given for said promissory note and mortgage. We think said paragraphs pleaded two separate defenses, to wit, (1) a failure of consideration; and (2) a breach of covenant against encumbrances. It is alleged that the deed expressly provided that the grantor "granted, bargained, sold, and conveyed" to the defendant the certain water right described therein, and thereby covenanted that said water right was free from encumbrances, and that prior to the execution and delivery of said deed, to wit, on the seventh day of August, 1890, the said grantor corporation placed a mortgage on said water right, together with other property, to secure certain *bona fide* indebtedness of said corporation, amounting to \$200,000, which indebtedness becomes due June 1, 1900, and that said mortgage is still a valid, subsisting lien against said water right, unsatisfied and unpaid. Section 2935 of the Revised Statutes, provides that, by the use of the word "grant" in any conveyance by which an estate of inheritance is to be passed, certain covenants (naming them) are implied, and among them the covenant, to wit, that the estate so conveyed is at the time of the execution of the conveyance free from encumbrances done, made, or suffered by the grantor, or any person claiming under him. The covenant there expressed is not one of warranty of title, or of quiet enjoyment against encumbrances. It is that the property so conveyed is free from encumbrances—that there

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are no encumbrances on it. Counsel for respondent seek to avoid the defense of breach of covenant against encumbrances by a citation of authorities on the rescission of voidable contracts, and among them cite *Price v. Hubbard*, 8 S. Dak. 92, 65 N. W. 436. It is held in that case that covenants of general warranty or for quiet enjoyment are essentially and conclusively prospective, and in the absence of fraud, or anything to overcome the presumption that the vendor of real property is able to respond in damages, a purchaser in possession under a deed with covenants of warranty, who has neither been evicted nor disturbed in his possession or quiet enjoyment, cannot, by showing a mere defect in the title, defeat an action to recover a balance due on the purchase price. That case has no application to the case at bar, this being a defense based on breach of covenant against encumbrances, while that case involved covenants of general warranty and of quiet enjoyment. That authority holds that said last-mentioned covenants cannot be broken without eviction. In cases of breach of covenant against encumbrances, the breach occurs when the deed is given, and no eviction is necessary. (8 Am. & Eng. Ency. of Law, 2d ed., 122; *Anderson v. Knox*, 20 Ala. 156; *Kramer v. Carter*, 136 Mass. 504.) Under the pleadings the appellant may interpose any defense in this action that would have been available against the original payee in said note and mortgage. In such cases the vendee may pay off the encumbrance, and recoup the sum so paid against the amount due on the purchase price. The appellant might have paid off said \$200,000 mortgage, but, if the allegations of the pleadings be true, he could not have then set off the sum so paid against the amount due on the purchase price note and mortgage, as that was only the sum of \$10,600. It is also averred that the payee corporation is insolvent, and that the reasonable value of the entire property described in said mortgage was less than the amount due on said mortgage. Under those circumstances, the vendee is not required to pay off the encumbrance. Nor would a judgment in an action at law for breach of said covenant of encumbrance, against the insolvent corporation, be an adequate or any remedy for the vendee. He has the right to a clear title

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before he can be compelled to pay the purchase price. (*Van Riper v. Williams*, 2 N. J. Eq. 407; *White v. Stretch*, 22 N. J. Eq. 76; *Bank v. Pinner*, 25 N. J. Eq. 495; *Arnold v. Curl*, 18 Ind. 339.)

We conclude that the court erred in striking out paragraphs 6 to 12, inclusive, of appellant's amended answer. Appellant should have been given an opportunity to prove the two defenses set up therein, to wit, total failure or want of consideration, and breach of covenant against encumbrances. The judgment is reversed, and the cause remanded for further proceedings in accord with the views herein expressed. Costs of this appeal are awarded to the appellants.

Huston, C. J., and Quarles, J., concur.

PETITION FOR REHEARING.

(January 3, 1900.)

Per CURIAM.—We have examined the petition for a rehearing in this case. It is simply a reargument of the case already presented, and considered and passed upon by the court, and we cannot find therein any grounds for a rehearing. It was not, for the purpose of deciding the case before us, necessary that we should pass upon the question of the allowance of attorney's fees, except for the rule of the statute, that, when a case is remanded to the lower court for further proceedings, we are required to decide all questions of law presented by the record. The decision embodies the law upon that question as we understand it. Rehearing denied.

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Argument for the State.

(December 8, 1899.)

STATE v. ANDERSON.

[59 Pac. 180.]

RAPE—UNCORROBORATED TESTIMONY OF PROSECUTRIX.—While a conviction for rape may be properly had upon the uncorroborated testimony of a prosecutrix, this would only be warranted when the reputation of the prosecutrix for chastity is unimpeached, and when the facts and circumstances surrounding the commission of the offense are corroboration and not contradictory of the statements of the prosecutrix.

SAME—INSTRUCTIONS—PREJUDICIAL ERROR.—In a prosecution for rape, an instruction which virtually instructs the jury that they may find corroboration of the testimony of the prosecutrix in her own statements is misleading and amounts to prejudicial error. (Syllabus by the court.)

APPEAL from District Court, Blaine County.

L. L. Sullivan, for Appellant.

At common law where the accused was not permitted to testify in his own behalf, the testimony of the prosecutrix might be sufficient to warrant a conviction for rape; but under the statutes of this territory where the accused avails himself of the right to testify, and clearly and explicitly denies the commission of the offense, there must be testimony corroborating that of the prosecutrix to authorize a conviction. (*Bueno v. People*, 1 Colo. App. 232, 28 Pac. 248; *State v. Baker*, ante, p. 496, 56 Pac. 81; *Sowers v. Territory*, 6 Okla. 436, 50 Pac. 257.)

Samuel H. Hays, Attorney General, for the State.

In many states by statute no conviction can be had on the uncorroborated evidence of the prosecutrix. We have no such statute in this state. The difficulties, however, of securing satisfactory evidence in cases of this kind have been recognized in every jurisdiction, but in the absence of a statute the lower court had no authority to instruct the jury as to the weight which they should give to the uncorroborated statement of prosecutrix. That was a matter entirely for the jury. (*State v. Wilcox*, 11

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Mo. 569, 33 Am. St. Rep. 551, 20 S. W. 314.) Defendant in answer denies the charge and accuses the prosecutrix of improper conduct with several boys. The extreme latitude permitted defendant in introducing evidence and testifying to matters entirely irrelevant, but which tended to prejudice defendant before the jury, is the most noticeable thing in the case. He was permitted to discredit her parentage. Also to testify to her alleged misconduct with several boys. This evidence was wholly inadmissible. The weight of authority is to the effect that in cases of this kind specific acts of misconduct cannot be introduced but in case they are introduced that they only go to the question of consent. (*People v. Shea*, 125 Cal. 151, 57 Pac. 885; *People v. Johnson*, 106 Cal. 289, 39 Pac. 622; *People v. Glover*, 71 Mich. 303, 38 N. W. 874.)

HUSTON, C. J.—The defendant was convicted of the crime of rape, alleged to have been perpetrated upon the person of one Emma Anderson, an adopted daughter of the defendant, and who, at the time of the alleged crime, was some thirteen years and nine months of age. The only evidence of the commission of the offense is the testimony of the prosecuting witness, which is, in substance, as follows: "I do not understand the nature of an oath. I do not know what the clerk has just said to me. I understand he told me to tell the truth. . . . I do not know what day of the week the 25th day of June was. I know clerk Nichols. I knew when he was up before the court. . . . I was at home on that day. . . . The day before that I was at home in Bellevue. Mr. Anderson was at home. I was at home on the evening of that day. So was Mr. Anderson. I went to bed that night between 9 and 10 o'clock. Mr. Anderson went to bed at the same time. His bed and mine are in the same room upstairs. We have slept in that room since last winter. Q. Did you see Mr. Anderson after you went to bed? A. No, sir. Q. I am speaking about the day before clerk Nichols' trial. Did you see him after you went to bed that night? A. I saw him after he went to bed. Q. Well, what did he do? A. He didn't do anything. I was awakened during the night after that, by Mr. Anderson. He was in my bed. I first found out

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Mr. Anderson was there quite a few minutes after he was there. He was dressed in his drawers and shirt. He did not say anything when he came to my bed. Q. What did he do? A. Took part of his person and put it to my person. Q. Did he put any part of his person in your person? A. Yes, sir. He stayed there five or ten minutes, and then went to his bed." This occurred, as prosecutrix states, on the 25th of June, 1889. She fixes the date by the time clerk Nichols was on trial at Hailey. This clerk Nichols seems to have been one of several young men who had been on terms of intimacy with the prosecutrix. And this is all the testimony on the part of the prosecution which tends in the slightest degree to incriminate the defendant. The prosecutrix is not corroborated in the slightest particular. The only attempt at corroboration is by the testimony of Dr. Brown, called by the prosecution, who testifies that he made an examination of the prosecutrix, and that she had the appearance of having been "penetrated repeatedly." It is not claimed that the defendant ever had connection with her but once. When she made complaint (which she says she first made to the prosecuting attorney) does not appear, but he had his preliminary examination on the eleventh day of July, 1899.

Were this an indictment at common law, or under the statute as it stood before the amendment raising the age of consent, it could not be contended, we apprehend, that the evidence is sufficient to warrant a conviction. Of course, it can be inferred from the statements of the prosecutrix that the defendant had sexual intercourse with her; but she does not say so, and we think that something more than inferences should be required to convict a man of seventy-seven years of age of a crime that will end his days in the penitentiary. The defendant is seventy-seven years of age. His physician, who has attended upon him for some fifteen or sixteen years, testifies that he is afflicted with a rupture, and is also suffering from an affliction of the spine, caused by an injury received in 1883, while building a house; and said physician further testifies that from his knowledge of the defendant's physical condition it is his opinion that he is not, and was not at the time of the alleged offense, capable of having sexual intercourse. The impression seems to have obtained with

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some courts and juries that, since the enactment of the statute "raising the age of consent," the simple charge of an act of sexual intercourse by a female within the prescribed age is all that is requisite to secure a conviction. We do not believe that the statute was intended to serve any such purpose. The case under consideration is an apt illustration—and we have had others—of the pernicious purposes to which such an interpretation of the law leads. A young hoiden, shown by the record to be, even at the age of fourteen years, or under, not *sans tache*, and whose reputation for truth and veracity is entirely impeached, makes this charge against an almost imbecile old man, to whose charity she is indebted for her very existence since she was nine months old; and upon the entirely uncorroborated testimony of this monster of precocious vice, this old man is sentenced to wear out the few remaining years of his life in the penitentiary at hard labor, and this is called "the administration of the law in justice." Upon the dubious, disjointed tale shown in the record we are asked to affirm a judgment which consigns an old man of previous good character to a felon's grave—for that is what the sentence amounts to. We decline to do it.

Exception is taken to an instruction of the court to the jury which is as follows: "You are hereby instructed that you should not convict the defendant on the uncorroborated testimony of the prosecutrix alone, but such corroboration may be by facts and circumstances connected with or surrounding the case; in other words, corroboration is not necessarily the testimony of other witnesses." The giving of this instruction, under the evidence in this case, was prejudicial. It was virtually saying to the jury that the prosecutrix might be corroborated by her own statements. She made no complaint until a long time after the alleged offense. Her person presented no evidence to support her charge; on the contrary, the physician called by the prosecution testified that she had the appearance of having been "frequently penetrated," and the record shows that she was in the habit of having intimate relations with, and being caught in compromising positions with, divers boys of about her own age. We think the instruction, except the first paragraph, was error, under the proofs in the case. Undoubtedly the rule is that a

Points decided.

defendant may be convicted of the crime of rape upon the uncorroborated testimony of the prosecutrix; but this is only so when the character of the prosecutrix for chastity, as well as for truth, is unimpeached, and where the circumstances surrounding the commission of the offense are clearly corroborative of the statements of the prosecutrix. This is the rule deducible from the authorities cited by the attorney general. (See *Tway v. State*, 7 Wyo. 74, 50 Pac. 188; *People v. Wessel*, 98 Cal. 352, 33 Pac. 216.) We think the correct rule is laid down in 3 Rice on Evidence, 826 et seq., also cited by the attorney general: "In prosecutions for rape it is very proper for the jury to be exceedingly cautious how they convict a defendant on the uncorroborated testimony of the prosecutrix, especially where there is evidence tending to impeach her credibility, for the experience of courts in modern times has amply attested the assertion of Lord Hale that the charge of rape is 'an accusation easy to make, and hard to be proved, and harder still to be defended by the party accused, though never so innocent.' (1 Hale's Pleas of the Crown, 635.)" The judgment and sentence of the district court are reversed, and, as we cannot see that the further prosecution of the defendant will be conducive of any good, it is ordered that the defendant be discharged from custody.

Quarles, J., concurs.

(December 9, 1899.)

FOX v. ROGERS.

[59 Pac. 538.]

NOTICE OF INTENTION TO MOVE FOR A NEW TRIAL—TIME FOR FILING.

An appeal from an order denying a new trial will be dismissed when it is shown that the notice of intention to move for a new trial was not filed and served upon the adverse party within ten days after the verdict as required by statute.

COMMINGLING CAUSES OF ACTION IN SAME COUNTY—DEMURRED—

MOTION TO STRIKE.—The comingling of several causes of action in one count of the complaint is prohibited by the code, but such comingling is not ground for demurrers, the remedy in such case being by motion to elect, and strike out.

Argument for Appellant.

CHECK—PRESUMPTIONS.—The law presumes that the drawer of a check has funds in the hands of the drawee to satisfy the check.

ALLEGATIONS OF COMPLAINT—PRESENTMENT OF CHECKS.—A complaint, seeking judgment upon certain checks, averred facts showing that the payee received the checks in a county adjoining the one in which the drawer was doing business, sixteen days before the drawer failed and became insolvent, but did not allege presentment or any fact excusing presentment, or any fact showing reasonable effort to present such checks. *Held*, on general demurrer that said complaint did not state a cause of action.

(Syllabus by the court.)

APPEAL from District Court, Custer County.

Milton A. Brown and Hawley & Puckett, for Appellant.

We fail to find in the complaint an allegation that plaintiff made due presentment, or any presentment, of the checks in question to the bank upon which they were drawn, and for that reason alone, even if our other positions are not well taken, the complaint fails to state a cause of action against defendant. (Daniel on Negotiable Instruments, sec. 1586; Tiedeman on Commercial Paper, sec. 443; *Smith v. Janes*, 20 Wend. 192, 32 Am. Dec. 527; *Middleton Bank v. Morris*, 28 Barb. 616; *Simpson v. Pacific etc. Ins. Co.*, 44 Cal. 139; *Richie v. Bradshaw*, 5 Cal. 228; *Veasy Bank v. Winn*, 40 Me. 60; *Mohawk Bank v. Broderick*, 10 Wend. 304; Daniel on Negotiable Instruments, 605; Chitty on Bills, 13th Am. ed., 433; Byles on Bills, 7th Am. ed., 211-213; *Phoenix Ins. Co. v. Gray*, 13 Mich. 191; *Adams v. Darby*, 28 Mo. 162, 75 Am. Dec. 115; 5 Am. & Eng. Ency. of Law, 1040 et seq.; *Parker v. Reddick*, 65 Miss. 242, 7 Am. St. Rep. 646, 3 South. 575; *Converse v. Johnson*, 146 Mass. 20, 14 N. E. 925.) The action is based upon four separate checks. Each of these checks constitute a separate cause of action. Under the provisions of section 4144 of the Revised Statutes, these checks can be sued on in one complaint but must be separately stated. Under a statute similar to ours the supreme court of Missouri held that a demurrer should be sustained to a complaint declaring upon two promissory notes in one count. (*McCoy v. Yager*, 34 Mo. 135.)

Alfred A. Fraser, for Respondent.

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The transcript does not conform to rules of this court as to the preparation and engrossment of the same, and the appeal should be dismissed. (*Fence v. Lemp*, 4 Idaho, 526, 43 Pac. 75; *State v. O'Donald*, 4 Idaho, 343, 39 Pac. 556; *Hattabaugh v. Vollmer*, 5 Idaho, 23, 46 Pac. 831.) The court cannot consider the action of the trial court in overruling the demurrer, as such action is not assigned as error either in the transcript, statement used on motion for a new trial or in the brief of appellant filed herein. The action of the court in overruling the demurrer was proper. The complaint states that the appellant had no funds in the bank to pay said checks and that before the time for presenting said checks had expired, said bank became insolvent. Under these allegations, it was not necessary to allege presentment before suit brought. (*Wheeler v. Commercial Bank* 5 Idaho, 15, 46 Pac. 830; *Wilmington Bank v. Cooper*, 1 Harr. (Del.) 10; *Dolph v. Rice*, 18 Wis. 397, 86 Am. Dec. 778.) Facts which render presentment and demand of payment unnecessary, may be alleged in lieu of allegations of presentment and demand. (*Cockrill v. Hobson*, 16 Ala. 393; *McDougald v. Rutherford*, 30 Ala. 252; *Brown v. Jones*, 125 Ind. 378, 21 Am. St. Rep. 227, 25 N. E. 452; *Peck v. Schick*, 50 Iowa, 281; *Jaccard v. Anderson*, 32 Mo. 188.) The court cannot review the sufficiency of the evidence to support the judgment, for the reason that the statement set forth in the transcript does not purport to contain all the evidence introduced in the trial court. (*Brown v. Casey*, 22 Pac. 257, 80 Cal. 504.)

QUARLES, J.—This action was commenced in the court below to recover upon four checks drawn by the defendant upon C. Bunting & Co., bankers. The complaint, after entitling court and cause, is in words and figures as follows: "The plaintiff, complaining of the above-named defendant, alleges: 1. That plaintiff and defendant are residents of the county of Custer and state of Idaho, and were, January 29 and 30, 1897, and ever since have been. That on the 30th of January, 1897, said defendant made, executed and delivered to this plaintiff his check in writing, printing, and figures as follows, at the town of Challis, in said state:

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“No. 504. Blackfoot, Idaho, Jan. 29, 1897.

“C. Bunting & Co., Bankers:

“Pay to the order of J. C. Fox (\$100.00) one hundred dollars.

“‘JOSEPH ROGERS.’

“That C. Bunting & Co. were bankers at said date, doing business at Blackfoot, Idaho, which place is one hundred and fifty miles distant from said town of Challis. That at said time and place he (defendant) made, executed and delivered to this plaintiff his further check, in the same form and manner, as follows:

“No. 508. Blackfoot, Idaho, Jan. 29, 1897.

“C. Bunting & Co., Bankers:

“Pay to the order of J. C. Fox (\$100.00) one hundred dollars.

“‘JOSEPH ROGERS.’

“And, further, at said time and place, he (defendant) made, executed and delivered to this plaintiff his check, in form and manner as above set forth, as follows:

“No. 505. Blackfoot, Idaho, Jan. 29, 1897.

“C. Bunting & Co., Bankers:

“Pay to the order of J. C. Fox (\$100.00) one hundred dollars.

“‘JOSEPH ROGERS.’

“That said checks Nos. 504, 505, and 508 were each and all made and delivered by said Joseph Rogers, the defendant, to this plaintiff for full value received. And plaintiff alleges, further, that the said defendant, at said time and place, made his further check, and delivered the same to this plaintiff, for value received in full, in manner and form as set forth in No. 504, as follows:

“No. 506. Blackfoot, Idaho, Jan. 29, 1897.

“C. Bunting & Co., Bankers:

“Pay to the order of J. C. Fox (\$100.00) one hundred dollars.

“‘JOSEPH ROGERS.’

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"That at said time, and for more than a year prior, this plaintiff was doing his banking business with the First National Bank at Boise City, in the said state, which by the nearest and most direct route, in point of time, by mail, is some four hundred miles, of which one hundred and fifty is by staging. That there is no more speedy way of communicating with Blackfoot than by stages, and Boise City is by rail three hundred and fifty or four hundred miles distant from the town of Blackfoot. Plaintiff further alleges that said defendant, as plaintiff is informed and believes, had, at the date of the execution and delivery of each and all of said checks Nos. 504, 505, 506, and 508, no deposit in said bank of C. Bunting & Co., aforesaid, which he does not now, and ever since and at the time of the execution thereof, claim as his own, without any provision for the payment of said checks, and each and all of them. That at the time of the delivery of said checks to plaintiff by the defendant, and before the legal time for their presentation had expired, the said bankers, C. Bunting & Co., were insolvent, and had refused to do a banking business, and that on the morning of the 15th of February, 1897, they failed; and plaintiff alleges, further, that from said date they have refused and failed to pay any sums excepting by order of the court. That on the 18th or about said day of February, 1897, the plaintiff demanded of defendant the payment of all said checks, which he, said defendant, refused, and ever since said time has so refused. That the plaintiff is the owner and holder of all of said checks, no part of which has been paid, although each and all are due and owing him. Plaintiff alleges, further that a check delivered on the date that these were, each and all of them, and sent by due course of mail, which is the most speedy way of communication between the towns of Challis and Blackfoot, could not and would not have been honored after bank hours on the 12th of February, 1897. Wherefore the plaintiff demands the judgment of this court against said defendant Joseph Rogers for the sum of \$400, together with interest from the 30th day of January, 1897.

"R. A. PIERCE,
"Plaintiff's Attorney."

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To the complaint the defendant filed the following demurrer: "Comes the defendant, and demurs to the complaint herein, and for grounds of demurrer alleges and shows to the court: 1. That the complaint does not state facts sufficient to constitute a cause of action against this defendant; 2. That several causes of action have been improperly united, in that the causes of action in said complaint are not separately stated and numbered, as required by statute, and the said complaint alleges four causes of action, each arising upon a separate written instrument for the payment of money only: 3. That the said complaint is ambiguous, unintelligible and uncertain, and that it is impossible to learn the amount claimed by plaintiff from the complaint." This demurrer was overruled, and the defendant answered. The case went to trial before the court and a jury, and a verdict for \$400 was given and entered October 6, 1898, in favor of plaintiff. The defendant, on October 27, 1898, served and filed notice of intention to move for a new trial. Afterward motion for new trial came on for hearing, and was denied. The defendant thereafter appealed from the judgment and from the order denying a new trial.

The respondent has moved to dismiss both appeals. The motion to dismiss the appeal from the judgment is denied, but sustained as to the order denying a new trial on the ground that the notice of intention to move therefore was not served and filed within ten days after the verdict, as required by section 4441 of the Revised Statutes. This leaves the case before us upon the judgment-roll, and our inquiry is confined to the sufficiency of the complaint.

The third ground of demurrer, that the complaint is uncertain for the reason that the complaint does not show the amount claimed by the plaintiff, is not sustained, as the complaint shows with certainty the amount to be \$400.

The second ground of the demurrer, that several causes of action have been misjoined, because four actions are conjoined in one count, and not separately stated, is not well taken. It is improper, under our code, to commingle in the same count of a complaint different causes of action, as was done in the case at bar; yet such commingling is not ground for demurrer, under

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section 4174 of the Revised Statutes. The remedy in such case is by motion to require plaintiff to elect which cause he will prosecute, and to strike out all matter relating to the other causes of action. The demurrer was properly overruled as to these two grounds. Of course, the trial court, pending such motion, might permit the plaintiff to file an amended complaint, in which each cause of action is separately stated, which would be proper.

We now come to the only remaining question, and which is the serious question in the case, to wit, the first ground of demurrer, that the complaint does not state facts sufficient to constitute a cause of action. The complaint shows that the four checks in question were delivered by the defendant to the plaintiff at Challis, county of Custer, on the thirtieth day of January, 1897; that C. Bunting & Co. did a banking business at Blackfoot, in an adjoining county; that stages run from Challis to Blackfoot, where C. Bunting & Co., the drawee, did business; that on February 15, 1897, said C. Bunting & Co., failed in business and became insolvent; that on February 18, 1897, the plaintiff demanded payment of said checks of the defendant, which payment the defendant refused to make. We do not think these allegations were sufficient. The law presumes that the defendant had funds in the bank upon which said checks were drawn with which to pay them. Section 3546 of the Revised Statutes is as follows: "If a bill of exchange, payable at sight or on demand without interest, is not duly presented for payment within ten days after the time in which it could with reasonable diligence be transmitted to the proper place for such presentment, the drawer and indorser are exonerated, unless such presentment is excused." Under section 3591 of the Revised Statutes, the drawer is exonerated by delay in presentment only to the extent of the injury which he suffers thereby. But the complaint in this case does not show that said checks were presented to C. Bunting & Co. at all, and does not show any excuse for not presenting said checks for payment prior to February 15th, the date of the alleged bank failure. No facts are alleged in the complaint showing that sixteen days was not a reasonable time, after deducting ten days therefrom, within which to present said checks at the proper place for payment.

Argument for Appellants.

The complaint showing on its face that the plaintiff had said checks for as long a period as sixteen days prior to the failure of the bank, and the law presuming that the drawer had funds in said bank to satisfy said checks, the presumption of law arises that the defendant was damaged by plaintiff's neglect to present said checks for payment to the extent of the face of said checks; and to overcome such presumption the facts, if any exist, showing that plaintiff could not, by reasonable diligence, have presented them prior to the failure of the said bank, should be alleged in the complaint. No such averments appear in the complaint, for which reason said complaint was not sufficient, and the first ground of the demurrer should have been sustained. For the foregoing reasons, the judgment is reversed, and the cause remanded to the district court for further proceedings in accord with the views herein expressed. Costs of appeal awarded to the appellant, but, in taxing the costs, only the cost of procuring and printing seven pages of the transcript to be allowed to the appellant.

Huston, C. J., and Sullivan, J., concur.

(December 11, 1899.)

FELDMAN v. SHEA.

[59 Pac. 537.]

PLEADINGS—DENIAL IN CONJUNCTIVE.—As used in the complaint, the words "sold and delivered" constitute but one act. The word "sold" as there used includes "delivery" and a denial of that act in the conjunctive raises an issue. *Held*, under facts of this case that respondent was liable for debt sued on.

(Syllabus by the court.)

APPEAL from District Court, Canyon County.

John C. Rice and H. A. Griffiths, for Appellants.

When the complaint states a cause of action, and the answer fails to raise any material issue, judgment should be rendered

Argument for Respondent.

on the pleadings. The test as to whether an answer presents any material issue is found in the question whether a complete cause of action remains without reference to the portions which may be denied by the answer. (*Gay v. Winter*, 34 Cal. 153; *Wallace v. Boisley*, 22 Or. 572, 30 Pac. 432; *Alvord v. United States*, 1 Idaho, 585; *Sweeney v. Schlessinger*, 18 Mont. 326, 45 Pac. 213; *Whitwell v. Thomas*, 9 Cal. 456; *Leffingwell v. Griffing*, 31 Cal. 231.) In the first paragraph of the answer the defendant denies that he is indebted to the plaintiffs in the sum of \$235.70, or in any other sum or sums whatever or at all, for goods, wares and merchandise sold and delivered to him by plaintiffs between the first day of January, 1893, and the first day of January, 1895, or at any other time or times whatsoever or at all. This denial, so far as it makes any reference to the allegation of sale and delivery, is in the conjunctive, and hence is evasive and not sufficient to raise an issue. (*Smith v. Doe*, 15 Cal. 101; *Blankman v. Vallejo*, 15 Cal. 239; *Kuhland v. Sedgwick*, 17 Cal. 123; *Rock Springs Co. v. Salt Lake Sanitarium Assn.*, 7 Utah, 158, 25 Pac. 742.) The true rule is that such a denial of indebtedness admits the facts from which indebtedness results. (*Lightner v. Menzel*, 35 Cal. 452; *Levison v. Schwartz*, 22 Cal. 229; *Taylor v. Shew*, 39 Cal. 536, 2 Am. Rep. 478; *Landers v. Bolton*, 26 Cal. 393, at page 417; *Kinney v. Osborne*, 14 Cal. 112.) Nor should it be forgotten that at one time Weissman was Shea's manager, and there was no apparent change in the ownership of the store, and no knowledge in the community of change of ownership. Under such circumstances, defendant's failure to notify those dealing with Weissman that he was not responsible is a ratification of the actions of Weissman done in his name. (*Philadelphia etc. R. Co. v. Cowell*, 28 Pa. St. 329, 70 Am. Dec. 128; *Heyn v. O'Hagen*, 60 Mich. 157, 26 N. W. 861; *Saveliand v. Green*, 40 Wis. 438.)

J. G. Watts, for Respondent.

The testimony is strongly favorable to defendant, and even were there a substantial conflict in the testimony the court would not be justified in disturbing the judgment, or order denying a new trial, if no rule of law has been violated. (*Mootry' v. Hawley*, 1 Idaho, 543; *Monarch etc. Co. v. Mc-*

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Laughlin, 1 Idaho, 617; *Ainslie v. Idaho World Printing Co.*, 1 Idaho, 641.) Taking the complaint in its most favorable light, the allegation is of a sale and delivery made in the ordinary course of business adopted by wholesale merchants of taking orders for and delivering goods, and in that sense the expression of the complaint "sold and delivered" constitutes but one act. The word "sold" as used in the complaint and in the course of business above indicated includes a delivery, just as the words "made and executed" or "executed" with reference to a deed imply delivery. (*Le Mesnager v. Hamilton*, 101 Cal. 533, 40 Am. St. Rep. 81, 35 Pac. 1054; *Elbring v. Mullen*, 4 Idaho, 199, 38 Pac. 404; *Johnson v. Manning*, 3 Idaho, 352, 29 Pac. 101; *Alsbaugh v. Reid*, ante, p. 223, 55 Pac. 300.)

SULLIVAN, J.—This action was brought to recover for goods, wares and merchandise alleged to have been sold and delivered to the defendant. The first paragraph of the answer denies that the defendant is indebted to plaintiff for "goods, wares and merchandise sold and delivered to him by plaintiffs" at any time. By the second paragraph of said answer defendant "denies that he purchased any goods, wares or merchandise from plaintiffs" at any time, and also denies "that he is indebted to said plaintiffs on any account, or for any cause whatever, or at all." When the cause came on for hearing, plaintiffs moved for judgment on the pleadings, which motion was overruled by the court, to which ruling plaintiffs duly excepted. The case was then tried to the court without a jury. A number of depositions were read in evidence on the trial, and three witnesses testified, and judgment was entered in favor of the defendant. The plaintiffs' motion for a new trial was denied, and this appeal is from the judgment and the order overruling the motion for a new trial.

Counsel for appellants assign as error the order overruling the motion for judgment on the pleadings, and contend that the denial of "sale and delivery" is in the conjunctive, and for that reason evasive, and not sufficient to raise an issue; and, as the words "sale" and "delivery" are not synonymous, the denial is not sufficient, and that the denial of indebtedness is a denial of

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a conclusion of law. The cause of action set forth in the complaint is on an indebtedness arising from a sale and delivery of goods. The complaint alleges that the defendant became indebted to plaintiffs in the sum of \$2,235.30 for goods, wares and merchandise, which had been sold and delivered to defendant. The words "sold and delivered," as used in the complaint, constitute but one act. The word "sold," as there used, indicates and includes a delivery, just as the words "made and executed," or the word "executed," when used with reference to a written instrument, simply indicate delivery in many instances. (*Le Mesnager v. Hamilton*, 101 Cal. 533, 40 Am. St. Rep. 81, 35 Pac. 1054; *Elbring v. Mullen*, 4 Idaho, 199, 38 Pac. 404.) We think the denials in the answer sufficient to raise the issue of indebtedness for goods sold and delivered.

Counsel for appellant assign as error the admission of certain evidence given on cross-examination by the witness York. We do not think that the admission of that evidence was prejudicial error.

The finding of the court to the effect that plaintiffs did not sell or deliver to defendant, and that defendant did not purchase or receive from the plaintiffs, any goods, wares or merchandise at the time alleged in the complaint, is assigned as error. After a most careful examination of the evidence, which was mostly by deposition, we conclude that the evidence does not justify said finding.

The evidence shows that said drug business was advertised in a weekly newspaper published in said Silver City from July 23, 1892, up to February 14, 1896, that defendant authorized said advertisement in July, 1892, and did not direct its discontinuance, but that Weissman, who was his agent, at least up to October 17, 1892, attended to said entire business, except to authorize said advertisement, at which last-mentioned date the defendant swears he sold said business to said Weissman. The record shows that said Weissman continued to run said business just as it had been run before said sale. The advertisement continued with some changes. Goods were ordered in the name of the defendant; shipped in his name, received in his name, and he had knowledge of those facts. The publisher of said

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newspaper testified that he visited said drugstore frequently from July, 1892, to February, 1896, and that there was no apparent change in the ownership or management of that drugstore, and that Mr. Shea never told him to discontinue said advertisement, and that during the greater portion of that time Shea was a subscriber to said newspaper, and it was sent to him weekly. Mr. Nichols, witness for plaintiffs, testified that the defendant was aware that said Weissman was having goods shipped in his (Shea's) name during the period of 1893 and 1894; that witness, as agent for said Shea, notified Weissman to cease having goods shipped in Shea's name; but goods continued to arrive in the name of Shea. It appears that Weissman purchased Shea's interest in said drugstore October 17, 1892, giving his promissory note for \$2,000 therefor, and not one dollar was ever paid thereon. On February 17, 1896, said Shea bought Weissman's interest in said drugstore, paying him \$200 therefor. Said Shea thereupon sold the same for \$750, and applied the \$750 on the debts contracted by Weissman in the name of Con Shea. During the time that Shea admits he was the owner of said drugstore he purchased goods from the plaintiffs, and after he sold said business to Weissman he did not notify the plaintiffs of such sale, and Weissman continued to order goods from them in the name of Shea, which fact Shea knew; and to have relieved himself of all liability he should have notified the appellants of his sale to Weissman. Much of the evidence we have not referred to, but, taken as a whole, it convinces us that said finding of fact and judgment entered thereon are erroneous, and must be set aside. We have no doubt but that Mr. Shea acted in perfect good faith, but through his negligence and carelessness he permitted said Weissman to purchase goods on Shea's credit, and he must pay the debt. The judgment is reversed, and the cause remanded for further proceedings in accordance with the views expressed herein. Costs of this appeal are awarded to the appellant.

Huston, C. J., and Quarles, J., concur.

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Argument for Respondent.

(December 12, 1899.)

SPONBERG v. ONEIDA COUNTY.

[59 Pac. 532.]

ASSESSORS AND COLLECTORS—POLL TAX—AMOUNT TO BE COLLECTED.

Under act of January 19, 1889, which was continued in force by the provisions of the constitution, it is the duty of the county assessors and collectors to collect on each poll after the second Monday in December, the sum of three dollars and fifty cents, and when he collects on such polls only the sum of three dollars after the second Monday of December, he must account to the county for the additional fifty cents on each poll so collected.

(Syllabus by the court.)

APPEAL from District Court, Oneida County.

George E. Gray and Dietrich & Stevens, for Appellant.

Respondent contends that he should have collected at the rate of three dollars and fifty cents per poll, and seeks to compel appellant to account at that rate, or for \$338 more than he collected. By the provisions of the act of March 9, 1895, "all unpaid taxes are delinquent" on the first Monday in January in each year. (3d Sess. Laws, p. 119.) Theretofore the delinquency occurred on the second Monday of December. (Rev. Stats., 1523.) The fifty cents added to the poll tax is clearly a penalty for delinquency, and it was clearly the intention of the legislature that delinquency on both poll and property tax should occur simultaneously. Such was obviously the intention and the motive of the amendment of 1889. (See 15th Sess. Laws, p. 3.)

S. H. Hays, Attorney General, for Respondent.

This matter is brought to this court by appeal, instead of writ of error. The appeal should therefore be dismissed. (*Rupert v. Alturas County*, 2 Idaho, 19, 2 Pac. 718; *Nez Perces County v. Latah County*, 3 Idaho, 413, 31 Pac. 800.) Under the statute (Rev. Stats., sec. 1771), it was the duty of the commissioners to charge the appellant with the additional sum. We have in this state two modes of raising revenue for general state and county purposes; one by means of a property tax and the

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other by means of a poll tax. It might be more convenient for the officer and to property owners, to have them become delinquent at the same time, but this was a matter wholly within the discretion of the legislature. The poll tax and the property tax do not necessarily have anything to do, with each other.

QUARLES, J.—The agreed facts in the case are, briefly, as follows: The appellant was assessor and tax collector for Oneida county during the years of 1897 and 1898. That between the second Monday in December, 1897, and the first Monday in January, 1898, appellant, as such tax collector, collected 676 poll taxes, and receipted therefor at the rate of three dollars each. That four hundred and fifty of said three dollar receipts were delivered to said collector by the county auditor of said county between said two dates. Appellant did not make any settlement with said auditor for three dollar poll taxes collected on the second Monday of December, 1897; nor did he return to said auditor any three dollar poll tax receipts on that day, nor did he demand or receive from said auditor any three dollar and fifty cent poll tax receipts prior to the first Monday in January, 1898. Appellant collected the said polls with the belief that poll taxes did not become delinquent, or the fifty cents penalty attach thereto, until after the first Monday in January. On the twenty-sixth day of July, 1898, the board of commissioners of Oneida county, in regular session, made an order to the effect that the appellant be charged with and held accountable for the additional fifty cents on each of said poll taxes, aggregating the sum of \$338. From this order of the board of county commissioners the appellant appealed to the district court, which affirmed said order of the board of county commissioners, and from the judgment of the district court affirming said order appellant appeals to this court.

There is only one question that we need to consider in this case, and that is the amount of a poll tax, under the statutes of this state, after the second Monday in December of each year. By act of January 19, 1889 (Sess. Laws 1888-89, p. 3), the last territorial legislature provided as follows:

“Section 1. Every male inhabitant of this territory over twenty-one and under fifty years of age, except paupers, insane

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persons, Indians not taxed, government pensioners, active members of any volunteer fire companies regularly enrolled as such, and persons permanently disabled so as not to be able to perform any manual labor, must annually pay a poll tax of three dollars, if paid on or before the second Monday in December and after that date three dollars and fifty cents.

“Sec. 2. Upon delivering any such receipts to the tax collector as described in section 1601 of chapter 8 of the Revised Statutes of Idaho Territory, the auditor must charge the same to him and take his receipt therefor. All such receipts delivered to the tax collector before the second Monday of December must be for the sum of three dollars each, and he must be charged that sum for each, and all such receipts delivered to the tax collector after the second Monday of December in each year must be for the sum of three dollars and fifty cents each, and he must be charged that sum for each.

“Sec. 3. On the second Monday in December, the tax collector must return to the auditor all the three dollar poll tax receipts received by him and not used, and make full settlement with the auditor therefor, and pay to the treasurer the total amount collected and not before paid in, and file the treasurer's receipt therefor with the auditor; and at the time of this final settlement on the first Tuesday after the first Monday of January in each year, the tax collector must return to the auditor all the three dollar and fifty cent poll tax receipts received by him and not used, and make final settlement therefor, and pay the treasurer all poll tax money not before paid in and file the treasurer's receipt therefor with the auditor.

“Sec. 4. Sections 1600-1604, 1613, chapter 8 of the Revised Statutes of Idaho Territory, are hereby repealed.”

The provisions of this act are plain, free from ambiguity, and need no construction; and said act was continued in force by the provisions of the constitution. Said act fixes the duties of the assessor and collector. He should have collected on each of the six hundred and seventy-six polls three dollars and fifty cents, instead of three dollars. He should have settled with the auditor on the second Monday of December, and returned the three dollar receipts, and demanded three dollar and fifty cent

Points decided.

receipts. But it is contended on behalf of the appellant that section 1523 of the Revised Statutes, as amended by the act of March 9, 1895 (Sess. Laws 1895, p. 119), makes "all unpaid taxes delinquent" on the first Monday in January of each year following the tax levy, and that the appellant believed that said section 1523 of the Revised Statutes, as amended by the act of March 9, 1895, applied to poll taxes. The said section 1523, as it stood originally and as amended by said amendatory act, does not relate to poll taxes, but only applies to property taxes. Mistake nor ignorance of appellants as to the provisions of the law, nor his construction thereof, nor his belief in the matter, excuses him from performing his duties. The judgment of the district court affirming the order of the board of county commissioners was correct, and the same is affirmed. Costs awarded to respondents.

Huston, C. J., and Sullivan, J., concur.

(December 12, 1899.)

DUNBAR v. CANYON COUNTY.

[59 Pac. 536.]

CONSTITUTIONAL LAW.—The appointment of a deputy under the provisions of section 6, article 18 of the constitution of Idaho is not the creation of an office.

SAME—APPOINTMENT OF DEPUTY CLERK NOT A CREATION OF AN OFFICE.—When the record shows that upon application by the clerk of the district court, who is ex-officio county recorder and auditor the board of county commissioners, after hearing of evidence in support of such application, found and determined that a necessity for such appointment existed, and thereupon authorized and empowered said officer to appoint such deputy and fixed his salary, and where it further appears that the fees and commissions of said office exceeded the maximum salary of such officer and that of the deputy authorized by the board of commissioners, it is the duty of said board of commissioners to audit and allow the claim for such salary of the deputy, and upon their refusal to do so, an action against the county for the amount of said deputy's salary will lie.

(Syllabus by the court.)

Opinion of the Court—Huston, C. J.

APPEAL from District Court, Canyon County.

S. H. Hays, Attorney General, and Frank J. Smith, for Appellant.

There is no law creating or recognizing the office of deputy clerk and *ex-officio* auditor and recorder, as one of the offices of a county in this state. In section 6, article 18 of the constitution, after enumerating the various county offices, there appears the following: "No other county offices shall be established." It follows, as a matter of course, that there shall be no county officers, except those chosen to fill the offices as provided by the constitution. In order to recover under the complaint filed in this action, it would be necessary to show that the office of deputy clerk and *ex-officio* auditor and recorder was a county office, created by the board of county commissioners, and fixing the compensation, which is expressly prohibited by the constitution in the section above quoted. (*Meller v. Board of Commrs.*, 4 Idaho, 44, 35 Pac. 712.) The board of county commissioners might find for various reasons that the necessity existed for the appointment of a deputy in a certain office, still the county would not be liable for the services of such deputy. (*Woodward v. Board of Commrs.*, 5 Idaho, 524, 51 Pac. 143.) There is nothing in the constitution or the laws of the state of Idaho that makes the salary of a deputy in the clerk's office, appointed under the authorization of the board of county commissioners, a legal charge upon the county. (*Eakin v. Nez Perces County*, 4 Idaho, 131, 36 Pac. 702; *Ada County v. Ryals*, 4 Idaho, 365, 39 Pac. 556; *Campbell v. Board of Commrs.*, 5 Idaho, 53, 46 Pac. 1022.)

John C. Rice, for Respondent, cites no authorities upon the point decided not found in appellant's brief.

HUSTON, C. J.—The plaintiff (respondent here) was clerk of the district court and *ex-officio* auditor and recorder of Canyon county. As such auditor and recorder he was, by law, the clerk of the board of commissioners of said county. It will be seen that here are three positions, separate and distinct from each other, in so far as the duties pertaining to each. On or

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about the thirteenth day of January, 1897, the plaintiff, who was then in office, applied to the board of county commissioners of said Canyon county, "praying for power to appoint a deputy for his office." At the January, 1897, meeting of said board, said application was heard, and evidence introduced in support thereof. The said board duly considered the evidence offered, and on the eighteenth day of January, 1897, found and determined that a necessity existed for the appointment of a deputy in said office, and made an order authorizing and empowering plaintiff to appoint a deputy, and fixed his salary at seventy-five dollars per month. Thereafter, on or about the nineteenth day of January, 1897, in pursuance of said order, plaintiff appointed a deputy for his said office. On the thirteenth day of October, 1898, plaintiff presented to said board of commissioners an account for the salary of said deputy, amounting to \$900, which account was disallowed by said board. Plaintiff brings this action against said Canyon county to recover the said sum of \$900. To the complaint of plaintiff a general demurrer was interposed, which was overruled by the district court. Defendant answered, denying, *inter alia*, that "said board of county commissioners found and determined that a necessity existed for the appointment of a deputy in plaintiff's said office"; and this seems to be the only issue raised by appellant on this appeal. The cause was tried by the court without a jury. After the introduction of plaintiff's testimony, defendant moved for a nonsuit, which motion was overruled by the court, "and, the defendant declining to put in any evidence, judgment was rendered for plaintiff," and from such judgment this appeal is taken.

Appellant enumerates two errors upon which it relies for a reversal of the judgment of the district court: 1. The court erred in overruling defendant's demurrer to complaint of plaintiff; 2. The court erred in overruling defendant's motion for a nonsuit. In support of the first contention of appellant it is urged that the complaint nowhere alleged that the services of said deputy were rendered for or on behalf of, or for the use and benefit of, Canyon county. This contention is not maintainable. The appointment of a deputy is not the creation of an office. Section 6, article 18, of the constitution of Idaho

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authorizes the county commissioners to empower the "auditor and recorder and clerk of the district court" to appoint such deputies and clerical assistance as the business of their office may require. The authorization of the appointment of a deputy by the board of commissioners is not an infraction of the provision of said section of the constitution, which provides that "no other county officers shall be established" than those enumerated in said section. This conclusion is inevitable when the whole section is read. This case does not come within the rule laid down by the court in the case of *Taylor v. Canyon Co.*, ante, p. 466, 76 Pac. 168. In that case this court held that, "before the county commissioners can legally empower the sheriff to appoint a deputy under the provisions of section 6, article 18, of the constitution, they must find that the business of such sheriff's office requires the appointment of a deputy." That case, like the present, was decided upon a demurrer to the complaint. In the case of *Taylor v. Canyon Co.*, *supra*, the complaint did not state that the board of county commissioners "had found and determined that a necessity existed for the appointment of a deputy." In the case at bar it is alleged (and by demurrer admitted) that the board did find and determine that a necessity for the appointment of a deputy existed, and therefore authorized such appointment.

It is further alleged in the complaint that the fees and commissions of said office for said year 1897, amounted to the sum of \$4,048.15, an excess of \$148.15 over the maximum salary of the officer and salary of his deputy as fixed by the board of commissioners. No burden was imposed upon the county by the payment of the salary of the deputy. The intention of the constitutional provision that these officers should, in so far as was practicable, be made self-sustaining, was not impinged upon or impaired. Judgment of the district court is affirmed, with costs to respondent.

Quarles and Sullivan, JJ., concur.

Argument for Appellant.

(December 13, 1899.)

IDAHO GOLD MINING COMPANY v. WINCHELL.

[59 Pac. 533.]

LIEN—INTERPLEADER ACTION.—A person who files a lien on property for material furnished, and thereafter appears in an interpleader action brought to determine the priority of the rights of creditors to the purchase price paid for the property on which the lien is claimed, and demands that his claim be paid out of said fund, waives such lien and is estopped from foreclosing the same.

MINING CLAIMS—OUSTER.—Where one unlawfully ousts the owner from mining claims and in working the same creates debts, such debts are not legal claims for liens against the mining claims.

ESTOPPEL—PURCHASE PRICE FUND.—Where one has a valid lien on property for the payment of a debt, and such property is sold on a contract made prior to the creation of such debt, and the claimant goes into a court of equity and asks to have his lien claim paid out of the purchase price fund, he is estopped from thereafter resorting to such property to make such debt.

DECREE OF COURT OF SISTER STATE.—A decree of a court of equity which has jurisdiction of the parties is binding on them, and if such decree affects the title to real property in another state such decree will be given force in that state.

(Syllabus by the court.)

APPEAL from District Court, Bannock County.

E. E. Chalmers, for Appellant.

The findings show that the alleged lien of Mr. Winchell is based upon the fact that he furnished wood or cordwood to the Union company while it was in possession of the mines. This wood was furnished subsequent to July 10, 1895, the date the Union company ousted plaintiff, and prior to January 14, 1896, the date the lien was filed. Consequently all rights herein are to be determined by the lien law of 1893 as amended in 1895. (Laws 1893, p. 49.) Subsequent sections give every person performing labor upon or furnishing cordwood, etc., a lien upon the wood. (Laws 1893, pp. 55-57.) These liens are purely statutory. If the statute does not expressly give the lien none exists. Nothing is plainer than the fact that a person who furnishes wood or cordwood to a mining company has no lien upon

Argument for Appellant.

the mine for the payment for his wood. He has the right to file a lien upon the wood, but not upon the mine. The principle of statutory interpretation here announced was applied in *Williams v. Toledo Coal Co.*, 25 Or. 426, 42 Am. St. Rep 799, 36 Pac. 159; *Silvester v. Quartz Min. Co.*, 80 Cal. 510, 22 Pac. 217; see, also, 13 Ency. of Law, 597. The record shows that the Winchell lien accrued between July 10, 1895, and January 1, 1896. It was foreclosed September 24, 1896; that is, the judgment of foreclosure was given on that day. The Idaho Gold Mining Company was not a party to the action. Therefore, the judgment of foreclosure is of no effect as to plaintiff herein, because plaintiff was not a party to the action wherein the same was given. (*Falconer v. Cochran*, 68 Minn. 405, 71 N. W. 386; 2 Black on Judgments, sec. 534.) As to the alleged lien, it is absolutely void as to plaintiff, because not enforced against plaintiff within six months after it was filed. The laws of Idaho provide that a lien shall be void unless enforced within six months after filing. (Idaho Laws, 1895 pp. 48-50; *Stoermer v. Bank*, 152 Ind. 104, 52 N. E. 606; *Falconer v. Cochran*, 68 Minn. 405, 71 N. W. 386.) It is a fundamental proposition in the law of every enlightened country, and particularly in the law of our country, that no person shall be deprived of his property without his consent, either express or implied. To permit a trespasser to cumber the property of an innocent and nonconsenting third person with charges and liens is to place the power of confiscation in private hands. (*Spruck v. McRoberts*, 139 N. Y. 193, 34 N. E. 896; *Hankinson v. Vantine*, 152 N. Y. 20, 46 N. E. 292; *Eaton v. Rocca*, 75 Cal. 93, 16 Pac. 529; *Fuller v. Pauley*, 48 Neb. 138, 66 N. W. 1115; *Steele v. Mining Co.*, 4 Idaho, 505, 42 Pac. 585.) Mr. Winchell either deemed the Union company the owner of the property, or he considered it agent of the owner. If he deemed it owner, his lien should be confined to its interest in the property, which is nothing. (*Jurgenson v. Diller*, 114 Cal. 491, 55 Am. St. Rep. 83, 46 Pac. 610; *Eaton v. Rocca*, 75 Cal. 93, 16 Pac. 529.) Mr. Winchell appeared in the interpleader suit and set up his claim to the fund, and the court found and decided that the Idaho company was entitled to have its property in Idaho

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freed of the liens and claims of defendants. His position in that matter is so inconsistent with his present attitude that it works an estoppel independently of the adjudication. (*Blaker v. Morse*, 60 Kan. 24, 55 Pac. 274; 2 Black on Judgments, sec. 632; Bigelow on Estoppel, 5th ed., 673-694; *Parke Co. v. White River Co.*, 101 Cal. 37, 35 Pac. 442.) The findings and decree in the interpleader suit are binding in all respects, both as to his claim upon the fund and as to his alleged lien upon the Idaho property. The decree of the court of equity having jurisdiction of the parties is binding upon those parties wherever they may be, and if it affects the title to property in another state, it will be given force in that state. (Black on Judgments, sec. 872; *Burnley v. Stevenson*, 24 Ohio St. 474, 15 Am. Rep. 621; *Newton v. Bronson*, 13 N. Y. 587, 67 Am. Dec. 89; *McGee v. Sweeney*, 84 Cal. 100, 23 Pac. 1117; *Goodman v. Niblack*, 102 U. S. 556; *Remar v. McKay*, 35 Fed. 86; *Townsdin v. Shrader*, 39 Kan. 286, 18 Pac. 186; *Southern Pac. R. R. Co. v. United States*, 168 U. S. pp. 48-53, 18 Sup. Ct. Rep. 18; *Wolf River Lumber Co. v. Brown*, 88 Wis. 638, 60 N. W. 996.)

W. T. Reeves and Thomas F. Terrill, for Respondent Winchell.

On the claim that Winchell had no lien because his claim was for wood, we call the court's attention to the twelfth finding of fact—wherein the court finds it was for wood actually used in the operation of the mine, and that a lien existed therefor is conclusive, and cannot be reviewed on this appeal, the evidence upon which it is based not being before this court by bill of exceptions or motion for a new trial. (*Wheeler v. Hayes*, 3 Cal. 287.) The sole issue presented by the pleadings in the case of *Wells, Fargo & Co. v. Union Mining and Milling Co. et al.*, was, Who is entitled to the money held by it? The question as to any existing liens upon the mining property located in Idaho, which was not even referred to in such pleadings, was not, and could not, be settled in that action, and any finding or conclusion or decree that might have been made in that action, outside of the issues thus presented, were and are void and are not binding on any party. (*Gregory v. Nelson*, 41 Cal. 278; *Cummings*

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v. Cummings, 75 Cal. 441, 17 Pac. 442; *Rudel v. Los Angeles Co.*, 118 Cal. 288, 50 Pac. 400.)

SULLIVAN, J.—This action was commenced against twenty-eight defendants for the purpose of quieting the title to the Robinson and Austin mining claims and the Robinson millsite, all of which are patented and located in Bingham county. Due service of the summons was made on all of the defendants. Some of them suffered default, others filed disclaimers, and others demurred, which demurrers were overruled, and those demurring refused to plead further. Only the defendant Winchell answered and defended in the case. Judgment was entered in conformity with the prayer of the complaint against all of the defendants except the respondent, Winchell; and, as to him, the court found that he had a valid lien and judgment against the said mining claims and millsite for the sum of \$649.47 and costs, which he was entitled to enforce. This appeal is from the judgment in favor of Winchell.

Numerous errors are assigned, all to the effect that the court erred in rendering judgment in favor of Winchell, the respondent.

The following facts appear from the record. That on the twenty-eighth day of November, 1894, E. E. Chalmers and others were the owners of said mining claims, and the millsite and improvements thereon, and on that date entered into an agreement with the Idaho Gold Mining Company, the appellant, whereby they agreed to sell and convey, by good and sufficient deed of conveyance, free and clear of all encumbrances, said property to appellant for the sum of \$5,700, to be paid in certain stipulated payments; said payments to be made at the bank of Wells, Fargo & Co., at Salt Lake City, Utah. A deed of said property, executed by said Chalmers and his co-owners, was at that time placed in escrow in said bank, to be delivered to the appellant corporation upon its making the payments as stipulated in said agreement. It was also agreed therein that the appellant should have immediate possession of said property, with the right to work the same during the life of said contract. It was also agreed that a former contract made by said E. E. Chalmers and co-owners with one Wilson for the sale

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of said property, and which had been assigned to the appellant, should be surrendered to said Chalmers and his co-owners, which was done, and thereupon the appellant was put in possession of said mining claims, millsite and other property, and began work thereon. That on the twenty-eighth day of January, 1895, said first-mentioned contract was duly recorded in the recorder's office in said Bingham county, Idaho. That on the sixteenth day of August, 1894, and prior to the making of the first-mentioned contract, said Chalmers and his co-owners of said property entered into an agreement with the Union Mining and Milling Company (hereinafter referred to as the "Union company"), whereby they gave said company an option to purchase said property, and that said option was forfeited by said Union company by reason of its failure to perform the stipulations of said contract agreed to be performed by it. Said forfeiture occurred prior to the making of the contract of November 28, 1894, with the appellant corporation. That on or about July 15, 1895, said Union company, claiming possession of said property under and by virtue of said forfeited option, entered upon said property, and unlawfully ousted appellant therefrom, and unlawfully held possession thereof from that date until about January 1, 1897. That during the time that said Union company so held possession of said property the respondent, Winchell, furnished wood to said last-mentioned company, which was used by said company in operating the mill situated on said property, and in working said mines. The Idaho Gold Mining Company, the appellant, kept and performed its contract with the owners of said property, and paid said \$5,700, as it had agreed to, and the escrow deed was delivered to it. During the time that said Union company was thus unlawfully in the possession of said property it contracted a large amount of indebtedness in operating said mines and property, and failed to pay the same. Thereupon some of the creditors, and among them the respondent, attempted to file liens against said property, thus attempting to hold the property for the sums due them. That, after said \$5,700 was so paid into said bank, said creditors desired to have the amounts due them paid therefrom. Thereupon said bank brought an action in the district court of the third judicial dis-

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trict of the state of Utah to compel said creditors to interplead among themselves, and to thus litigate and settle their various claims and priorities in and to said purchase money. That, among many others, respondent, Winchell, appeared therein, and answered, claiming an interest in said money. Thereafter said action was tried, and judgment made and entered for the distribution of said fund among the various creditors according to their respective priorities. The respondent failed to get any part of said money applied on his claim. The trial court found the facts as above stated, among others, and also found, as a conclusion therefrom, that the respondent, Winchell, was not bound or estopped by the findings and judgment entered by said Utah court in said interpleader suit, and that the appellant was entitled to the discharge of its said property from the liens and claims of each and all of the defendants, except that of respondent Winchell, and also found that Winchell's lien for \$649.47, with costs, was a prior lien, and that he was entitled to foreclose the same. The Utah court found that appellant was entitled to a discharge of all of said property from the liens and claims of all the defendants, Winchell, the respondent, being one of them. It is also shown that the Union company procured deeds from the owners of said property to the greater portion of it during the time that the contract of sale with the appellant was in full force; that is, the owners, after making the contract with the appellant corporation, and while the same was in force, executed deeds of conveyance to the Union company for the most of said property.

It is contended by counsel for respondent that the Union company was not only the agent for, but the owner of, said property, so far as liens created in the working of said mines was concerned, and he calls attention to Session Laws of Idaho, 1893, page 49, in support of that contention. We cannot construe said act to support respondent's contention. Section 1 of said act is as follows:

"Section 1. Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, dike, flume, tunnel, fence, machinery, railroad, wagon road, aqueduct to

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create hydraulic power or any other structure, or who performs labor in any mine or mining claim, has a lien upon the same for the work or labor done or materials furnished, whether done or furnished at the instance of the owner of the building or other improvement or his agent; and every contractor, subcontractor, architect, builder, or any person having charge of any mining or of the construction, alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of and owner for the purpose of this chapter; provided, that the lessee or lessees of any mining claim shall not be considered as the agent or agents of the owner under the provisions of this chapter."

We do not think said act was intended to include a transaction like the one in the case at bar. If a person or corporation can unlawfully take and hold possession of the property of another, and create liens against it, as was done in this case, an owner may be deprived of his property without his consent, and without due process of law. Had the Union company gone into possession of said property with the consent of the appellant, then a very different question would be presented.

Counsel for respondent admit that the only question for determination is, Was the Union company the owner of that said property for the purpose of creating the lien of respondent? We answer that question in the negative. Respondent in his answer avers that at the time he furnished said wood to the Union company it was "working and operating said mines as owners, and not as lessees, of any person or company," and that his claim of lien was filed, and suit brought to foreclose the same, against said Union company, and judgment then taken against it. The appellant company was not made a party to said suit, nor had it any interest therein. The respondent evidently considered the Union company the owner of said mining claims, and, under the facts of this case, his lien must be confined to his interest in said mining claims, which was nothing, at least, after the purchase price had been paid by the appellant. It is well settled that a lien like that under consideration cannot be imposed on property by one who has unlawfully ousted the owner. If so, it would be taking his property without his consent, against his will, and without due process of law.

Points decided.

In the interpleader action in the Utah court, respondent claimed an interest in the purchase price fund paid by appellant for said property, and asked to have his claim paid out of it. That fund was exhausted in the payment of claims prior to that of respondent's. He is estopped by his election to look to said fund, as well as by the force of the adjudication of the Utah court and the facts of the case. It is well settled that a decree of a court of equity, having jurisdiction of the parties, is binding on them, and, if it affects title to property in another state, such decree will be given force in that state. (Black on Judgments, sec. 872; *McGee v. Sweeney*, 84 Cal. 100, 23 Pac. 1117; *Goodman v. Niblack*, 102 U. S. 556, 26 L. ed. 229.) The Utah court agreed that said pretended lien of respondent on said property was not a lien thereon, and that said property was discharged from the liens and claims of each and all of the defendants to that action, and this court will give effect and force to that decree. The judgment in defendant's favor is reversed, and the cause remanded, with instructions to the lower court to set said judgment in favor of respondent aside, and to enter judgment and decree quieting appellant's title to said property as against said lien of respondent. Costs of this appeal are awarded to the appellant.

Huston, C. J., and Quarles, J., concur.

(December 14, 1899.)

SCOTT v. HARKNESS.

[59 Pac. 556.]

OLOGRAPHIC WILL—MARRIED WOMEN.—The statutes of Idaho do not empower a married woman to make an olographic will.

(Syllabus by the court.)

APPEAL from District Court, Bannock County.

Dietrich Chalmers & Stevens and Hawley & Puckett, for Appellant.

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A married woman in Idaho who is over the age of eighteen years and of sound mind has the power, capacity and competency to make a valid olographic will; that is to say, she is not disqualified in the premises simply by reason of her coverture. Our statutes relating to olographic wills, as well as to the property rights of married women, may be traced primarily to the civil law, as introduced by Spanish and Mexican settlers on the coast, and in the south. Section 5307 of the Revised Statutes of Idaho is as follows: "An olographic will may be proved in the same manner that other private writings are proved. (Rev. Stats., sec. 5725.) Section 5726 of the Revised Statutes: "A married woman may dispose of all her separate estate by will, without the consent of her husband, and may alter or revoke the will in like manner as if she were single. Her will must be attested, witnessed and proved in like manner as all other wills." If the legislature intended to deprive a married woman of her classification as a person or of the power to make an olographic will, or if it intended to except her from the operation of the general statutes, why did it not say so? Such exception was made in England (2 Bishop's Law of Married Women, secs. 534, 535), in New York (2 Bishop's Law of Married Women, 2d ed., sec. 539; 1 Redfield on Wills, 29), and in Mississippi (2 Bishop's Law of Married Women, sec. 539).

Reeves & Gough for Respondent, cite no authorities upon the question decided by the court not cited by appellant.

HUSTON, C. J.—This is an appeal from a judgment of the district court affirming an order of the probate court denying probate of an instrument purporting to be the olographic will of Catharine Harkness, deceased, wife of appellant. To the petition of appellant praying the probate of said alleged will the plaintiff filed a complaint alleging among other things that said instrument, alleged to be the olographic will of said Catharine Harkness, deceased, was not the olographic will of said decedent, for that the same was not entirely written, dated, and signed by the hand of the decedent and testator

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herself, as required by the laws of the state of Idaho. To this complaint the defendant (appellant here) filed a demurrer, which was overruled by the probate court. Defendant then filed an answer to the complaint, and the cause was heard by the probate court, which court rendered judgment adjudging and decreeing that "the said will of Catharine Harkness, deceased, be, and the same is hereby, rejected from probate, and declared not to be the last will and testament of Catharine Harkness, deceased." From this judgment of the probate court an appeal was taken to the district court. The only evidence offered in the probate court was the testimony of the defendant, Harkness, including a copy of the will in question. By agreement of counsel, the record as made in the probate court, including the bill of exceptions, should be and constitute the record in the district court. The district court affirmed the judgment of the probate court, and from said judgment this appeal is taken.

Two questions are presented to us by the record in this case:

1. Can a married woman make an olographic will, under the statutes of Idaho? 2. Was the instrument alleged in this case to be the will of Catharine Harkness, deceased, an olographic will?

As to the first question, a married woman could not make a will at common law. Her power to do so comes entirely from the statute. Until the revision of our statutes in 1887, there was no statute of wills in Idaho. Sections 5725 to 5728, inclusive, of the Revised Statutes of Idaho, are as follows:

"Sec. 5725. Every person over the age of eighteen years, of sound mind, may, by last will, dispose of all his estate, real and personal, and such estate not disposed of by will is succeeded to as provided in chapter 14 of this title, being chargeable in both cases with the payment of all the decedent's debts, as provided in this code.

"Sec. 5726. A married woman may dispose of all her separate estate by will, without the consent of her husband, and may alter or revoke the will in like manner as if she were single. Her will must be attested, witnessed, and proved in like manner as all other wills.

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"Sec. 5727. Every will, other than a nuncupative will, must be in writing, and every will, other than an olographic will, and a nuncupative will, must be executed and attested as follows: 1. It must be subscribed at the end thereof by the testator himself, or some person in his presence, and by his direction must subscribe his name thereto; 2. The subscription must be made in the presence of the attesting witnesses or be acknowledged by the testator to them to have been made by him or by his authority; 3. The testator must, at the time of subscribing or acknowledging the same declare to the attesting witnesses that the instrument is his will; and 4. There must be two attesting witnesses, each of whom must sign his name as a witness, at the end of the will, at the testator's request and in his presence.

"Sec. 5728. An olographic will is one that is entirely written, dated and signed, by the hand of the testator himself. It is subject to no other form, and may be made in or out of this territory, and need not be witnessed."

The established rule that a general statute empowering all persons over a certain age and of sound mind to "dispose of all his estate, real and personal, by will," does not include married women seems to have been recognized by the legislature in the foregoing enactment. The only power, then, given by the statute to married women to make a will is such as is conferred by section 5726 of the Revised Statutes. We do not think olographic wills are included within the purview of that section. The will of a married woman "must be attested, witnessed, and proved, in like manner as all other wills." An olographic will need not be witnessed. The will of a married woman must be; and we do not think the addition of the words, "in like manner as all other wills," or the fact that the statute provides that certain kinds of wills need not be witnessed, can properly be urged as intending to extend the power granted by section 5726. We do not feel that we can extend by construction what seems to be the clear intentment of the law. Had it been the intent or purpose of the legislature to extend the power of married women, as expressed

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in section 5726, they would have done so in terms apt and conclusive of that end. This would seem to be the view entertained by the code examiners of California in suggesting, and of the legislature of that state in enacting, the amendment to the statute of that state, from which our statute was copied. (See Cal. Civil Code, sec. 1273, and note.) From a careful examination of all the decisions of the courts of those states having a similar statute, we are constrained to hold that under the statutes of this state a married woman is not authorized to make an olographic will. We believe that, to be in accord with advanced opinion as evidenced by contemporaneous legislation, married women should be allowed testamentary powers, covering both olographic and nuncupative wills; but such powers can only be conferred by the legislature, and to undertake to confer them by judicial construction would be an assumption of power not authorized by the fundamental law.

This conclusion renders it unnecessary for us to pass upon the second question presented. We would say, however, that we have examined every case attainable, and, while we have found no case of an olographic will by a married woman, the cases are uniform in holding that, where it appears that the statute has not been strictly complied with, the instrument will be rejected. See the case of *Billings, Estate of*, 64 Cal. 427, 1 Pac. 701, and cases there cited, wherein the point upon which the wills were rejected was identical with that raised in the case at bar, to wit, that a part of the date was printed. The judgment of the district court is affirmed, with costs to respondent.

Quarles and Sullivan, JJ., concur.

Argument for Appellants.

(December 18, 1899.)

COFFIN v. RICHARDS, MAYOR.

[59 Pac. 562.]

FUNDING BONDS—DESCRIPTION REQUIRED—SUBMISSION OF QUESTION TO ELECTORS.—Where it is proposed to call an election for the purpose of submitting to the electors of any town or city the question of issuing bonds for the funding of an existing indebtedness of such town or city, and the ordinance providing therefor does not describe the indebtedness sought to be funded, as prescribed by section 2 of the act of February 2, 1899, all proceedings thereunder are invalid.

(Syllabus by the court.)

APPEAL from District Court, Ada County.

C. C. Cavanah, for Appellants.

The act governing the proceedings of the defendants in endeavoring to submit to the legal voters of Boise City, the proposition of funding the outstanding indebtedness of said city by the issue and sale of municipal funding bonds recites certain steps to be taken by the defendants. (Sess. Laws 1899, p. 29.) We maintain that the provisions of the statute in question are merely directory, as it only prescribes the mode and manner to be pursued by the mayor and council when in presenting to the people the question of funding an outstanding indebtedness of said city. (Sutherland on Statutory Construction, 573; *Reed v. Supervisors of Henry Co.*, 31 Gratt. 695; *Packwood v. Kittitas Co.*, 15 Wash. 88, 55 Am. St. Rep. 875, 45 Pac. 640; *Richards v. Klickitat Co.*, 13 Wash. 509, 43 Pac. 647; *Seymour v. City of Tacoma*, 6 Wash. 427, 33 Pac. 1059; *State ex rel. Mullen v. Doherty*, 16 Wash. 382, 58 Am. St. Rep. 39, 47 Pac. 958; *Brand v. Town of Lawrenceville*, 104 Ga. 486, 30 S. E. 954; *Derby & Co. v. City of Modesto*, 104 Cal. 515, 38 Pac. 900; *State ex rel. Bennett v. Barber*, 4 Wyo. 56, 32 Pac. 14.) Affirmative words make a statute directory, and negative or exclusive words make it imperative. (*Attorney General v. Baker*, 9 Rich. Eq. 521.) The notice is generally required to specify the purpose to promote which the

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bonds are proposed to be issued. In designating this purpose, it is not essential to go into minute details. It is sufficient to state its general character, provided there is nothing in the statement tending to substantially mislead the voters. (*People v. Counts*, 89 Cal. 15, 26 Pac. 612; 6 Am. & Eng. Ency. of Law, 325; McCrary on Elections, 3d ed., sec. 190; *State v. Van Camp*, 36 Neb. 9, 91, 54 N. W. 119.)

N. M. Ruick, for Respondent.

The statute under which it is proposed to issue these bonds, and the only one authorizing an issue of bonds by a city "to provide for the funding, refunding, purchase and redemption of the outstanding indebtedness of such city," is the re-enacted statute found at page 29, Laws of 1899. The issue of municipal bonds is ordinarily authorized upon certain conditions being complied with. Such conditions may be imposed by constitutional provisions, by legislative act, or by the municipal authorities. Conditions imposed by the constitution or legislature must be strictly complied with. (15 Ency. of Law, 1271; *Leavenworth etc. R. R. Co. v. Platte Co.*, 42 Mo. 171; *Essex Co. R. Co. v. Lunenburg*, 49 Vt. 143; *Town of Eagle v. Kohn*, 84 Ill. 292.) Compliance with all substantial or material conditions is essential before the bonds can be lawfully issued. (*Harding v. Railroad Co.*, 65 Ill. 90; Dillon on Municipal Corporations, secs. 163, 164; *Jackson v. Brush*, 77 Ill. 59; *Gaddis v. Richmond Co.*, 92 Ill. 119.) Such provisions are mandatory, and must be strictly followed. (Cooley's Constitutional Limitations, 88 et seq.; Sutherland on Statutory Construction, secs. 454-456; Endlich on Interpretation of Statutes, sec. 437 et seq.; *Corbett v. Bradley*, 7 Nev. 106; *Reeve v. City of Oshkosh*, 33 Wis. 477; *State Prison Agt. v. Lathrop*, 1 Mich. 438; *Hoyt v. Saginaw*, 19 Mich. 39, 2 Am. Rep. 76; *Peopie v. San Francisco*, 36 Cal. 595; *Dunbar v. Board*, 5 Idaho, 407, 49 Pac. 412.) That issue and sale of these bonds would be the incurring of indebtedness, and the statute under which it is proposed to issue them so treats it. (Laws 1899, p. 30, sec. 2, last clause; *Bannock Co. v. Bunting*,

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4 Idaho, 156 37 Pac. 279.) Notice must be given as required by statute, even where the object of the issuance of the bonds is to take up outstanding warrants bearing a higher rate of interest. (*Duryee v. Friars*, 18 Wash. 55, 50 Pac. 583.) The notice required by law must be given or the issue of the bonds will be enjoined. (15 Ency. of Law, 1276; *George v. Township of Oxford*, 16 Kan. 72; *Harding v. Railroad Co.*, 65 Ill. 90; *Bowen v. Mayor of Greenboro*, 79 Ga. 709, 4 S. E. 159.)

HUSTON, C. J.—The plaintiff brings this action to enjoin the issuance of certain bonds authorized to be issued by the mayor and common council of Boise City under and by virtue of an act of the legislature of Idaho, approved February 2, 1899. To the complaint of the plaintiff the defendants interposed a general demurrer, which was overruled by the court and defendants refusing to further answer, judgment was entered by the district court in favor of the plaintiff and against defendants, granting the injunction prayed for. From such judgment this appeal is taken.

Section 2 of the act of February 2, 1899, above referred to, provides, *inter alia*, that “whenever the common council of such city or the trustees of such town, or other legislative body of any such city or town, shall deem it advisable to issue the coupon bonds of such city or town, for any of the purposes aforesaid, the mayor and common council of such city or the trustees of such town shall provide therefor by ordinance, which shall specify the purpose of issuing such proposed bonds; if it is to create a new debt, the object thereof must be stated, or if it is to fund or refund any existing indebtedness, it must be described; and when it consists of warrants or other securities, they must be described by giving their number, date and amount, and the fund out of which the same, according to the terms thereof, are payable; and the ordinance shall declare the purpose and the total amount for which such bonds shall be issued,” etc. On the eleventh day of April, 1899, the mayor and common council passed a resolution containing the following: “Be it further resolved, that the purpose of issuing

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of said municipal funding bonds is to fund the outstanding indebtedness of said Boise City other than municipal bonds. That the total amount for which bonds shall be issued is \$55,000." It is contended by the respondent that this is not a compliance with the requirements of section 2 of the act of February 2, 1899, which requires that, in the ordinance submitting the question of the issuing of bonds "to the qualified electors, who are taxpayers of such city or town," where the object is "to fund or refund any existing indebtedness, it must be described," etc. The only description in the ordinance is the very general one, "that the purpose of issuing of said municipal funding bonds is to fund the outstanding indebtedness of said Boise City, other than municipal bonds"; and this statement is not helped out by the allegations of the complaint, even were we allowed in this case to resort thereto. Certainly the legislature meant something when they enacted section 2 of the act of February 2d, and we are not at liberty to ignore their action. It is contended by appellant that the provisions of section 2 of the act of February 2d are merely directory and that therefore a failure to comply with them is not fatal. It is not necessary for us to hold that a perfectly literal compliance with all the details of said act is necessary, but in this case there has not even been an attempt to substantially comply with them. It is impossible to tell from the ordinance or resolution what the nature or character of the indebtedness sought to be funded is. It is simply "the outstanding indebtedness of said Boise City other than municipal bonds." In *Dunbar v. Board*, 5 Idaho, 407, 49 Pac. 409, we said: "In such cases [the funding of existing indebtedness] we will not say that the proposed issue of bonds is legal unless it affirmatively appears by the record that all of the provisions of our constitution and statutes in force relating to the subject matter have been complied with"; and to the like effect was the holding of this court in *Bannock Co. v. C. Bunting & Co.*, 4 Idaho, 156, 37 Pac. 277. We could hardly, in the face of these decisions, sustain the contention of appellants herein. While we may admit that there are cases wherein a

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strict compliance with all the details of a statute need not be insisted upon, so long as the ultimate purpose of the statute is accomplished without fraud or injury to anyone we cannot so stretch the rules of construction as to ignore entirely the positive and express provisions of the statute. The judgment of the district court is affirmed, with costs to respondent.

Quarles and Sullivan, JJ., concur.

(December 18, 1899.)

MURPHY v. BOARD OF EQUALIZATION FOR LINCOLN COUNTY.

[59 Pac. 715.]

BOARD OF EQUALIZATION.—Section 1483 of the Revised Statutes as amended by act of March 13, 1899, does not contravene the provisions of the constitution.

SAME—JURISDICTION.—A board of county commissioners, acting as a board of equalization, has jurisdiction to order additions made to the list of property assessed to an individual taxpayer.

SAME—WRIT OF REVIEW.—Mere irregularity in the exercise of a rightful power by a board of equalization will not be reviewed on *certiorari*.

SAME—INCREASING LIST OF PROPERTY—PRESUMPTION.—Courts will not presume that orders made by a board of equalization increasing the list of property assessed to an individual tax payer was made without evidence.

CERTIORARI—MINISTERIAL ACT.—*Certiorari* does not lie to review a ministerial act performed by a ministerial officer acting in a ministerial capacity.

ASSESSOR—CONSTITUTIONAL LAW.—A county assessor should make such changes upon the assessment-roll of his county as the board of equalization for his county has ordered, relative to the assessment of an individual taxpayer.

(Syllabus by the court.)

APPEAL from District Court, Lincoln County.

N. M. Ruick, for Appellant.

The provisions of the state constitution and of the statutes directly involved in a consideration of this case are: Const.,

Argument for Respondent.

sec. 12, art. 7; Rev. Stats., secs. 1475, 1483, as amended by Laws 1899, p. 454, and secs. 1484, 1485—the latter as amended and re-enacted by Laws 1899, p. 261. If it was the intention of the board to limit its action to directing the assessor to so add property to the number, amount or quantity previously assessed by him, it should have been made to appear. (*People v. Reynolds*, 28 Cal. 107, 115.) The statute, having specified what they may do, necessarily excludes every other power. The court cannot add to or take from the words of the statute. (Extract from opinion in *Orr v. State Board of Equalization*, 3 Idaho, 190, 28 Pac. 416.) No presumption of jurisdiction or regularity of proceedings are indulged in favor of courts and tribunals of inferior or limited jurisdiction, and all special boards and tribunals which are created by law and clothed with judicial functions of a limited and special character; and all persons who claim any right or benefit under their judgments must show their jurisdiction affirmatively. (*Hahn v. Kelly*, 34 Cal. 392, 409, 94 Am. Dec. 742, and note; *State v. Officer*, 4 Or. 180, 183; *Rhode v. Davis*, 2 Ind. 53; *Johnson v. Eureka Co.*, 12 Nev. 28; *Rosenthal v. Madison P. R. Co.*, 10 Ind. 359; *Fayette Co. v. Chitwood*, 8 Ind. 504; *Plummer v. Waterville*, 32 Me. 566; *Northcut v. Lemery*, 8 Or. 322.)

Guy C. Barnum and Edward A. Walters, for Respondent.

We fail to recognize any departure from the provisions of the law taken as a whole, both by its express terms and implications. In one place (Rev. Stats., sec. 1483, as amended by Laws 1899, p. 454) it says: "It may direct the assessor to make the required entries," while section 1484 of the Revised Statutes, speaks in direct and mandatory terms and says: "The clerk must enter upon the assessment book all changes and corrections made by the board"; while section 1503 of the Revised Statutes, requires the clerk under oath to vouch for the correctness of the record of the proceedings. That the order in the case at bar was directed to the assessor is to be presumed from the fact that in every case where the board of equalization as shown by the record directed its orders to anyone, it

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was to the assessor. (*Fowler v. Russel*, 45 Kan. 425, 25 Pac. 871; *Allison Ranch Min. Co. v. Nevada Co.*, 104 Cal. 161, 37 Pac. 875.) The jurisdiction of the board to act in the matter of increasing an assessment is complete after giving to the person assessed the notice prescribed by that section and the board may give such notice on its own motion. (*Allison Ranch Min. Co. v. Nevada Co.*, 104 Cal. 161, 37 Pac. 875; *Farmers' etc. Bank v. Board of Equalization*, 97 Cal. 318, 32 Pac. 312.) The presumption in all proceedings relating to taxes is in favor of regularity. (*Chamberlain v. City of St. Ignace*, 92 Mich. 332, 52 N. W. 634.) *Certiorari* is not the proper remedy to reach errors and irregularities of inferior tribunals in determining questions of fact. Unless a statute confers the power of reviewing determinations of inferior tribunals upon questions of fact, such determinations are conclusive and cannot be reversed on *certiorari*. (2 Wait's Actions and Defenses, p. 134, sec. 1; *Andrews v. Andrews*, 14 N. J. L. 141; *Starr v. Trustees of Rochester*, 6 Wend. 564; *State v. Senft*, 2 Hill (S. C.), 367; *Ex parte Nightingale*, 11 Pick. (Mass.) 168; *Willimson v. Carman*, 1 Gill & J. (Md.) 196; *Hauser v. State*, 33 Wis. 678.) Mere errors and irregularities which do not affect the jurisdiction are not reached by this proceeding. (Wait's Actions and Defenses, p. 137, sec. 4; *Bazior v. Lasch*, 28 Wis. 270; Idaho Rev. Stats., 4960.)

QUARLES, J.—On July 13, 1899, the respondents, the county commissioners of Lincoln county, sitting as a board of equalization, ordered that certain raises be made in the migratory stock assessments of divers parties, one of them being the appellant. The order, so far as it relates to appellant, is as follows: "Board called to order as a board of equalization, and ordered the following raises on migratory stock assessments, as follows: . . . Murphy, J. D., from one hundred cattle to two hundred cattle. . . . The clerk was ordered to notify the persons raised." November 7, 1899, appellant appealed to the district court for a writ of review, which issued, and the return thereto certified up to the district court the proceedings of said board of equalization. Upon the hearing of the return to the writ the district court affirmed the said order of the board, and

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from the judgment of the district court in the premises this appeal is brought.

In the affidavit of appellant upon which the application for the said writ is based, the following appears: "By which order so made and entered the number of cattle returned by the assessor of said county as owned by this affiant for the purposes of taxation for the fiscal year 1899, was increased from one hundred to two hundred head; that said change so ordered by the said board of equalization was entered by the auditor of said county upon the assessment-roll of said county for the fiscal year 1899." The contention of the appellant is that the board of equalization exercised an assessorial power in making said order, and that such power is not conferred either by the constitution or statutes upon such board, for which reason said order was without the jurisdiction of the board and void. By section 12, article 7, of the constitution it is provided that "the boards of county commissioners for the several counties of the state, shall constitute boards of equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county under such rules and regulations as shall be prescribed by law." Section 1483 of the Revised Statutes, as amended by Act of March 13, 1899 (Sess. Acts 1899, p. 454), is as follows:

"Sec. 1483. During the session of the board of county commissioners, sitting as a board of equalization, it may direct and require the assessor to assess any taxable property that has escaped assessment, increase any valuation, or add to the amount, number, quantity or value of any property, when a false, inaccurate or incomplete list has been furnished or rendered; and in making such alterations, additions or new assessments, he shall note the previous assessments 'Canceled' and such new entries, with the alterations and additions, shall be deemed the true assessment of the property affected thereby. When any assessment made by the assessor is deemed by the board so incomplete or inaccurate as to render doubtful the collection of the tax thereon, the board shall direct him to make a new assessment thereof, as heretofore provided, marking such defective assessment 'Canceled.' All persons whose

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assessment is altered, modified or affected in the amount or valuation of property charged to them, shall be notified by the clerk of said board, by letter deposited in the United States mail, postpaid and addressed to such person interested, at least ten days before the final action is taken in fixing and equalizing such assessment, of the day fixed when he may be heard upon the matters affecting the assessment of his property for taxation, which shall be on the fourth Monday in July of each year, or as soon thereafter as he can be heard or his matter be reached."

We see nothing in the provisions of this statute which conflicts with the constitution. Under this statute the board made said order, and the clerk of the board gave to the appellant the proper notice. The appellant had the right to appear before the board and show that such increase or "raise" in his assessment should not be made. We are not authorized to presume that said order was made without evidence, or that appellant did not own two hundred head of cattle in Lincoln county, subject to assessment for the year 1899, and there is nothing in the record which so shows. The board had jurisdiction to make said order. That is the only question before us for determination. Mere irregularity, if such exists, in the exercise of such jurisdiction cannot be reviewed in this proceeding. The noting of the change ordered upon the assessment roll, if made by the wrong officer, cannot be reviewed here, because it is a ministerial, and not a judicial or *quasi* judicial, act. If it be the duty of the assessor, and not the auditor (which we think is the case, but which we do not here determine), to make such change upon the assessment-roll, the assessor can and should yet make it, if he has not done so. The judgment of the district court is affirmed, with costs to respondents.

Huston, C. J., and Sullivan, J., concur.

PETITION FOR REHEARING.

(January 15, 1900.)

Per CURIAM.—A petition for a rehearing has been filed in this case, and in it counsel state as follows: "In practical

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operation, the decision of the court heretofore filed has had its effect, the parties affected by the action of the board of equalization of Lincoln county in adding property to the assessment-roll having all paid taxes on the full amount of their assessment, including the amount added, for the year 1899, and no subsequent action by this court, as we understand it, can affect them or the county revenues for the year 1899"—and suggest that the only reason why a rehearing is desired is that a principle of law suggested, urged, and much relied upon by the appellant in this case may be determined. As the controversy is ended, we are not inclined to consider the matter further, and a rehearing is denied.

(December 19, 1899.)

MAHONEY v. NEISWANGER.

[59 Pac. 561.]

APPROPRIATION OF WATER—PRIOR RIGHTS.—The right of a prior appropriator of water cannot be defeated to any portion thereof, on the ground that he has by reason of a mistake as to the location of his boundary lines used a portion of such waters upon other land than his own.

SAME—FIRST IN TIME FIRST IN RIGHT—BENEFICIAL USE.—Under the facts in this case, *held*, that the rights of plaintiff as prior locator have not been impaired by reason of his not having put the water appropriated by him to a beneficial use. The doctrine of *Hillman, v. Hardwick*, 3 Idaho, 255, 28 Pac. 438, and *Conant v. Jones*, 3 Idaho, 606, 32 Pac. 250, affirmed.

(Syllabus by the court.)

APPEAL from District Court, Ada County.

W. E. Borah and Wyman & Wyman, for Appellant.

The evidence shows that the plaintiff owns three hundred and twenty acres, and that there is only about seventy inches of water supplied by the springs. And even if he had not actual acreage sufficient to cover the entire seventy inches, he would have the right to increase his acreage from year to year, which the evidence all shows they were doing. (*Conant v.*

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Jones, 3 Idaho, 606, 32 Pac. 250; *Hindman v. Rizer*, 21 Or. 112, 27 Pac. 13; *Simmons v. Winters*, 21 Or. 35, 28 Am. St. Rep. 727, 27 Pac. 7.) The plaintiff derives no benefit whatever from any use that was made prior to his entry upon the land, and took no rights by reason of any oral transfer made by Carpenter; in fact, there was not even an oral transfer. Carpenter simply relinquished to the government and Neiswanger went upon the land. (*McGinnis v. Stanfield*, ante, p. 372, 55 Pac. 1020; *Ada Co. Irr. Co. v. Farmers' Canal Co.*, 5 Idaho, 791, 51 Pac. 990.) One of the controlling features of this case is that the defendant Neiswanger took all his alleged rights with the positive notice that every inch of that water which the spring supplied had been actually appropriated and claimed for the Dorsey ranch alone. This point is illustrated in the case below. (*Last Chance Co. v. Bunker Hill Co.*, 49 Fed. 430.) Neiswanger could acquire no rights until his entry, February 8, 1898. (*Rourke v. McNally*, 98 Cal. 291, 33 Pac. 62; *Atherton v. Fowler*, 96 U. S. 513; *Denver v. Mullen*, 7 Colo. 345, 3 Pac. 693; *St. Onge v. Day*, 11 Colo. 368, 18 Pac. 278; *Quimby v. Conland*, 104 U. S. 420; *Durand v. Martin*, 120 U. S. 366, 7 Sup. Ct. Rep. 587.) The right to water acquired by prior appropriation is not dependent upon the place where the water is used. A party having obtained a prior right to the use of a given quantity of water is not restricted in such right to the use or place to which it was first applied. (*Union Mill Co. v. Danbury*, 81 Fed. 155; *Hobart v. Wyck*, 15 Nev. 418; *Ramelli v. Irish*, 96 Cal. 214, 31 Pac. 41; *Davis v. Gale*, 32 Cal. 27, 91 Am. Dec. 554.) A party need not apply all the water sought to be appropriated or diverted the first year. He may add from year to year acreage of his cultivated land and increase his application of water thereto as necessity may demand and his abilities permit, until he has put into beneficial use the entire amount of water at first diverted. (*Conant v. Jones*, 3 Idaho, 606, 32 Pac. 250.) Original appropriation may be made with reference to the amount of water that is needed to irrigate the lands he desires to put into cultivation. (*Simmons v. Winters*, 21 Or. 35, 28 Am. St. Rep. 727, 27 Pac. 7; *Pomeroy on Riparian Rights*, sec. 47.)

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Hawley & Puckett and J. H. Richards, for Respondents, cite no authorities on the points decided not cited by appellant.

HUSTON, C. J.—This action was brought by the plaintiff to settle the right to certain waters to which both plaintiff and defendants assert claims. From the judgment of the district court, as well as from the order denying a new trial, plaintiff appeals.

The district court finds that the plaintiff and his predecessors in interest own and have been in possession of three hundred and twenty acres of land, as claimed in his complaint; that the same have been owned and possessed by plaintiff and his predecessors in interest since 1870; that in 1870 the predecessor in interest of the plaintiff appropriated forty inches of the waters in dispute, and diverted them to and upon the said lands. Said court also finds that in the month of May, 1893, the predecessor in interest of the defendants appropriated twenty-five inches of said water for use upon the lands owned by them, and the judgment of the district court is based upon such findings. It seems from the evidence that the water in question flows from certain springs upon the land of the defendant Jones, lying adjacent to the lands of plaintiff, but which lands were a part of the public domain at the time the predecessors of the plaintiff located and appropriated said waters. It appears that from 1870 until 1897 the plaintiff and his predecessors in interest used the entire volume of water flowing from said springs in irrigating the lands cultivated by them, but that—as very frequently occurs in this country—the lines of survey not yet being established, or, if established, not clearly understood, the plaintiff's predecessors had conducted a part of said waters upon some adjoining land not included in the tract owned by them. The tract so included (as shown by the map in evidence) amounted to something over twenty acres, and is a part of the tract of land now owned by the defendants, and of which their predecessor became possessed in 1893. There is no question but the running of the waters upon the lands now owned by the defendants occurred through a mistake as to the location of the lines of plaintiff's lands. The con-

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tention of counsel for respondents that the defendants could acquire any right or title to the water by reason of this mistake, we cannot agree with. We know of no principle of law or equity that will support such a claim. It is claimed by respondents that plaintiff has not put the entire waters of said springs to beneficial use; that the entire flow of water from said springs is some seventy inches; that it requires about one inch to the acre to properly irrigate land in that locality; that plaintiff nor his predecessors have ever had sufficient land under cultivation to require seventy inches of water. Undoubtedly, under our constitution and statutes, the appropriation of waters from any stream in this state must, to entitle a party to maintain his right thereto, be subjected and applied to some useful or beneficial purpose. At the time when the waters in question were first appropriated by the predecessors of plaintiff, to wit, in the year 1870, they were the owners of and in the possession and occupancy of three hundred and twenty acres of arid land, for the purpose of irrigating which they appropriated all the waters flowing from the said springs. They constructed ditches for the purpose of conveying said waters upon their land, which ditches were of a capacity sufficient to carry all the waters flowing from said springs, and, as the evidence clearly shows, have continued to use all of said waters upon their lands from that time, with the single exception of so much thereof as was by mistake used by them upon the lands subsequently acquired by the defendants. In *Hillman v. Hardwick*, 3 Idaho, 255, 28 Pac. 438—a case in which the facts were in some particulars similar to those in the case at bar—we held, under the statutes of Idaho, which provide (section 3159 of the Revised Statutes of Idaho), “as between appropriators, the one first in time is first in right,” that H. who, and his grantors, appropriated first all the waters of Gooseberry creek, and has continually used same for the purpose of irrigating the lands owned by him upon and along said creek, is entitled to all of said waters, to the extent of the capacity of his ditches, necessary to the proper irrigation of his said lands, as against subsequent locators. (See, also, *Conant v. Jones*, 3 Idaho, 666, 32 Pac. 250.) We are unable to find from the

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record that the defendants or their predecessors in interest ever acquired, by location or appropriation, any right to any of the waters in dispute. Their attempt to predicate a right to any portion of said waters by reason of the mistake of plaintiff and his predecessors, as hereinbefore stated, cannot obtain. Several witnesses, who have been acquainted with the lands of plaintiff from the present time back to 1870, and most of whom have worked thereon at various times between those dates, state emphatically that, with the exception of the mistake before referred to, all the waters appropriated by the predecessors of plaintiff have been continuously used upon the lands of plaintiff, except when interfered with by defendants, and are necessary for the proper irrigation thereof. There are some other questions presented by the record, but we do not deem it necessary to pass upon them, as they do not affect the decision. Under the rule laid down by this court in *Hillman v. Hardwick* and *Conant v. Jones*, *supra*, we are unable to sustain the conclusions of the district court in this case. The judgment of the district court is reversed, with costs to appellant. Cause remanded for further proceedings in accord with this opinion.

Quarles and Sullivan, JJ., concur.

(December 20, 1899.)

BALL v. CAMPBELL.

[59 Pac. 559.]

PLEADING—ELECTION IRREGULARITIES.—A complaint in this case examined and held not to state a cause of action.

(Syllabus by the court.)

APPEAL from District Court, Bannock County.

Winters & Guheen, for Appellant.

If the sections of the statute in regard to voting are mandatory, then there is no question under the record in this case that the judgment of the lower court should be reversed; but should this court hold that the said sections of the said laws

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were simply directory, then and in that event we contend that the said malconduct of the said judges of election in said Pocatello precinct No. 2 was so rank and reckless as to give their returns no standing whatever, and thus it would be incumbent upon each candidate to prove, if he can, the number of legal votes cast for him in said precinct; otherwise the said whole vote of the said precinct should be thrown out and set aside and not considered in the said election. We think that this is the rule. (*Lloyd v. Sullivan*, 9 Mont. 577, 24 Pac. 218; 10 Am. & Eng. Ency. of Law, N. S., p. 766, sec. 2; *Attorney General v. McQuade*, 94 Mich. 439, 53 N. W. 944; *Russell v. McDowell*, 83 Cal. 70, 23 Pac. 183.) Statutory provisions which are clearly mandatory must be substantially complied with; and even directory provisions cannot be so grossly departed from as to make it impossible or extremely difficult to determine whether fraud had been committed or anything done which would affect the result of the election. (10 Am. & Eng. Ency. of Law, N. S., 768; *Atkinson v. Lorbeer*, 111 Cal. 119, 44 Pac. 162; *Lloyd v. Sullivan*, 9 Mont. 577, 24 Pac. 218; *Londoner v. People etc.*, 15 Colo. 557, 26 Pac. 135; *Attorney General v. McQuade*, 94 Mich. 439, 53 N. W. 944, and cases cited; *Russell v. McDowell*, 83 Cal. 70, 23 Pac. 183.)

Hawley & Puckett and Thomas F. Terrell, for Respondent.

Undoubtedly the general rule is, that if legal votes have been cast in good faith by honest electors, it is the duty of the court or tribunal trying a contest to ascertain their number and give them effect, notwithstanding misconduct or even fraud on the part of the election officers. Such fraud or misconduct may destroy the value of the officer's certificate, and may subject him to severe punishment, but the innocent voter should not suffer on that account, if by any means his rights can be upheld. (McCrary on Elections, 2d ed., 304; McCrary on Elections, 3d ed., 489; *Luckey v. Police Jury*, 46 La. Ann. 679, 15 South. 89-93.) The complaint or petition in an election contest must state the grounds of contest with particularity and certainty, so that the adverse party may be prepared to meet them, and not be taken by surprise. (*Todd v. Stewart*, 14 Colo. 286, 23 Pac. 426; *Smith v. Harris*, 18 Colo. 274, 32 Pac. 616;

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Howard v. Shields, 16 Ohio St. 184; *Whitney v. Blackburn*, 17 Or. 564, 11 Am. St. Rep. 857, 21 Pac. 874; *Greely v. Holland*, 14 Nev. 320; *Soper v. Sibley Co.*, 46 Minn. 274, 8 N. W. 111; *Boyer v. Teague*, 106 N. C. 576, 19 Am. St. Rep. 547, 11 S. E. 665; *Melvin's Case*, 68 Pa. St. 333; *Batterson v. Fuller*, 6 S. Dak. 257, 60 N. W. 1071; *Taylor v. Taylor*, 10 Minn. 81 (107); *Rigsbee v. Durham*, 99 N. C. 341, 6 S. E. 64; *Whipley v. McCune*, 12 Cal. 352.)

HUSTON, C. J.—At the general election held in Bannock county in November, 1898, the plaintiff and defendant were candidates for the office of clerk of the district court for said Bannock county. The defendant received the certificate of election, and duly entered upon the performance of the duties of said office. Plaintiff brings this action under the provisions of the act of February 25, 1891, concerning elections and electors, and the acts amendatory thereof, for the purpose of contesting the election of defendant. To the complaint of the plaintiff filed herein, the defendant interposed a general and special demurrer, the district court sustained said demurrer, and, plaintiff declining to further amend (the complaint had been once amended), the court rendered judgment dismissing the complaint, with costs. From such judgment this appeal is taken.

The only question submitted for our decision is, Was the action of the district court in sustaining the demurrer of defendant to plaintiff's complaint erroneous?

The complaint, after some preliminary allegations, proceeds as follows: "7. That by and through the malconduct of the judges of election in said Pocatello precinct No. 2 and each of them, the election in said Pocatello precinct No. 2 is and was fraudulent, corrupt, illegal, unlawful, and void, and the same should be set aside and annulled, for the following reasons, to wit: (a) That by and through the malconduct of the said judges of election in said Pocatello precinct No. 2, and their wrongful acts, the said judges of election allowed and permitted many persons other than the officers of election, whose names are to the plaintiff unknown, to enter the space inclosed by the guard rail, and reserved for voters, in excess of the number of shelves and compartments provided for voting, and

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that each and all of said persons so unlawfully within said inclosure were by said judges allowed and permitted to have official ballots in their, and each of their, possession, and were permitted and allowed by said judges to discuss the various candidates for the various offices, and to discuss the manner of voting said ballots. (b) That the said judges of election in said Pocatello precinct No. 2 wrongfully and unlawfully allowed and permitted numerous persons, whose names are to plaintiff unknown, to enter the said inclosed space reserved for the voters, and to procure official ballots, and then allowed and permitted them to leave the said inclosed space, and the building in which said election was held, and to take the official ballots with them from said building, without voting. (c) That the said election judges in said Pocatello precinct No. 2 wrongfully and unlawfully allowed and permitted many persons, whose names are to plaintiff unknown, at the same time to mark their ballots by placing the official ballot upon the wall of the building, in full view of the spectators, and there marking the same, while many others would retire behind the shelves or compartments prepared for voting, and in company of each other would mark and prepare their ballots. (d) That in many instances the judges would permit more than one person to enter the same booth or voting compartment and prepare and mark their ballots together. The names of said parties are unknown to plaintiff. (e) That the said judges allowed and permitted many persons, whose names are to plaintiff unknown, to visit from one booth or voting compartment to another that was then occupied, to instruct or be instructed in regard to voting. (f) That many persons, whose names are unknown to plaintiff, were allowed and permitted by the said judges to receive the official ballots, and then retire from the building without voting at all, and take away the official ballot. (g) One person (J. H. Green) was allowed to vote without having been first registered. (h) Some persons, whose names are unknown to plaintiff, were by said judges allowed to vote without receiving an official ballot from the distribution clerk—thus causing and allowing many fraudulent votes to be cast and

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counted at said election in said precinct No. 2, the number and extent of which is unknown to the plaintiff; and there is no means by which the polls can be purged of such fraudulent votes. 8. That on the twelfth day of November, 1898, the board of county commissioners of said Bannock county convened and sat as a canvassing board of the returns of said election, and that at said meeting of said canvassing board the returns of said election were canvassed, and the said contestee, James S. Campbell, Jr., was by said board declared duly elected to the said office of clerk of the district court, and a certificate of election to said office of clerk of the district court was thereupon issued, under the direction of the said board, to the said James S. Campbell, Jr., contestee. 9. That, should the said election so held in Pocatello precinct No. 2 be by this honorable court set aside and declared to be null and void, it would change the result of the election for the office of clerk of the district court of Bannock county. Whereupon the plaintiff and contestant prays judgment against the defendant and contestee that the said election so held in Pocatello precinct No. 2 be declared null and void, and that the same be by this honorable court set aside; that the plaintiff and contestant be declared the duly elected clerk of the district court of Bannock county. Plaintiff prays for such other and further relief as to the court may seem just and equitable in the premises. Plaintiff prays for his costs and disbursements in this action."

The primary object of our election law is to secure to the elector a free, untrammelled expression of his will concerning the matters submitted for decision, unawed by intimidating influences, uncontrolled by corrupt or fraudulent practices; and, when the will of the elector has been expressed as required by law, such expression must not be set aside or negatived for light or trivial causes. Before the court will assume to set aside the expressed will of a majority of the electors of a county or precinct, it should be well satisfied that there has been such a disregard of the provisions of law enacted for the conduct of elections as taints the entire poll with fraud. It is not every irregularity that will justify the court in invalidating the poll of an entire precinct. Section 132 of the act referred to pro-

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vides, *inter alia*, that any election may be contested: "1. For malconduct, fraud or corruption on the part of the judges of election in any precinct, township or ward, or any board of canvassers or any member of either board sufficient to change the result." The complaint charges a number of omissions by the judges, in "permitting" certain things to be done which it is claimed should not have been done, but nowhere does the complaint charge that such acts were, or were any of them, done with the knowledge or consent of the judges. Permission implies leave, license consent. How, then, could the judges of election be said to permit acts of which it does not appear they have any knowledge? While it is true that the judges of election have supervisory control of the elections, and are authorized to see that the laws concerning elections are not violated, still they are not to be held responsible for every irregularity that may take place at or about the polls. The law has provided an officer whose duty it is to preserve order and decorum at and about the polls. The judges are not expected to act as ministerial officers as well as judges. There is an incongruity about such a unity of functions, too apparent to be tolerated. Should a judge of election, after his attention had been called to an infraction of the law, refuse or neglect to proceed at once against the derelict, then, indeed, might there be some ground for charging him with malconduct. But to say that a judge of election is guilty of malconduct because of the commission of irregularities (and none of the acts charged in the complaint amount to more than irregularities, except the voting of one person, J. H. Green, without being registered) of which he did not have, and cannot reasonably be supposed to have had, any knowledge, when such charge involves such serious consequences as the disfranchisement of many hundred voters, is a proposition we cannot entertain. There is no certainty or distinctness in the allegations of the complaint. No names are given in a single instance, except that of Green above referred to. "Many persons," "many instances," "some persons." This is not a sufficient predicate upon which to base a charge fraught with such far-reaching consequences. Officers who are charged with the control of elections should be vigilant in seeing that

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the provisions of law are carried out and enforced, and all good citizens should, and will, whenever they are aware of infractions of the law or the commission of irregularities, see at once that those vested with authority are made aware of the same. More good will be accomplished by the honest, energetic action of a few good men at the polls, in endeavoring to preserve the purity of the election, than by any number of contests instituted after the election, and too frequently, we fear, founded upon recollection and reminiscence. We should be sorry to believe that such a condition as is intimated (not charged) in the complaint exists in any precinct in this state. We think the demurrer to the complaint was properly sustained. The judgment of the district court is affirmed, with costs to respondent.

Quarles and Sullivan, JJ., concur.

(December 21, 1899.)

KING v. CO-OPERATIVE SAVINGS AND LOAN ASSOCIATION OF SIOUX FALLS, SOUTH DAKOTA.

[59 Pac. 557.]

ESTOPPEL—FORMER ADJUDICATION.—Parties to a judgment, which has been reversed or set aside or annulled in a proper proceeding are precluded from again litigating the same cause of action determined by such judgment. K., a junior mortgagee, sued his mortgagor and the senior mortgagee to have his mortgage lien adjudged prior to that of the senior mortgagee, alleging specific acts of fraud on the part of the senior mortgagee, by which he was induced to accept his junior mortgage; the cause was determined adverse to K. and in favor of the senior mortgagee; afterward K. commenced an action to have a deed, which he had executed to the senior mortgagee, and which was in fact the consideration for K's mortgage, annulled on the ground of fraud in the procurement thereof, alleging the same facts alleged in the former suit. *Held*, that he was estopped by the former adjudication.

(Syllabus by the court.)

Argument for Respondent.

APPEAL from District Court, Bannock County.

S. C. Winters, for Appellant.

The only right of a second mortgagee is the right of redemption, and he must either pay or tender the amount due or he will not be heard to complain in a court of equity. (2 Jones on Mortgages, 2d ed., sec. 1431; *McKenna v. Neff*, 43 Ind. 503; *McConkey v. Laub*, 71 Iowa, 636, 33 N. W. 146.) The court failed to find on one of the most important facts in the case—that is, the fact as to whether or not there was a former adjudication of the issues in this case, and the court should have found on that issue as the issues in the case of *W. H. King v. W. A. Boyce*, and this appellant, and decided on the sixteenth day of August, 1898, are identical with the issues in this case, and the judgment in that case is a bar to this action. (*Wolverton v. Baker*, 86 Cal. 591, 25 Pac. 54; *Shepard v. Stockham*, 45 Kan. 244, 25 Pac. 559.) It was the duty of the respondent to tender to the appellant the amount actually due on the mortgage before the redemption time had expired, and if he failed to do this he has no one to blame but himself. He says that he was perfectly able to redeem the property—was worth enough to protect his interests, had he seen fit to protect himself. (*McConkey v. Laub*, 71 Iowa, 636, 33 N. W. 146; *Hoover v. Johnson*, 47 Minn. 434, 50 N. W. 475; *German Nat. Bank v. Barham*, 57 Ark. 533, 22 S. W. 95; *Wood v. Holland*, 57 Ark. 198, 21 S. W. 223.)

W. T. Reeves, for Respondent.

It is now urged that the court should have found on all the issues in the cause, and that all the matters in issue had been formerly adjudicated. This objection is raised for the first time in appellant's brief, and the two cases cited from 25 Pac. by counsel do not touch this point. We contend that if counsel desired a finding on this point it was his duty to have made a request for the court to make a finding on the fact he so desired. (*Wilson v. Wilson*, 64 Cal. 94, 27 Pac. 861; *Touchard v. Crow*, 20 Cal. 163; *Edgar v. Stevenson*, 70 Cal. 287, 11 Pac. 704; *Noland v. Bull*, 24 Or. 479, 33 Pac. 983; *Hicklin v. McClear*, 18 Or. 126, 22 Pac. 1061.)

Opinion of the Court—Quarles, J.

QUARLES, J.—This suit was commenced by the respondent to obtain a judgment decreeing cancellation of a certain quitclaim deed made by the respondent to the appellant November 16, 1895, conveying lots 17 and 18, block 489, in the city of Pocatello. The complaint is quite lengthy. We summarize the allegations of the complaint necessary to be noticed as follows: That in August, 1892, appellant loaned J. B. Green and wife a certain sum of money, and took a mortgage from them upon said described lots; that Green's wife did not acknowledge the mortgage, which was therefore void; that February 12, 1894, said lots were sold for delinquent taxes for the preceding year, and purchased at tax sale by the respondent, who, after the time for redemption had expired, received a tax deed to said lots from the assessor and collector; that at said time respondent purchased at delinquent sale lots 11, 12, 13, and 14, in block 259, said city, the last four lots being sold for the 1893 taxes of W. A. Boyce, the then owner of said lots; that prior to said sale W. A. Boyce and wife had mortgaged said four lots to appellant to secure \$1,000, borrowed money; that in January, 1895, appellant represented to respondent that there was only \$750 due on its said mortgage, and induced respondent to take a second mortgage on said Boyce lots for the sum of \$400, the amount of taxes and penalties due on both the Green and Boyce properties; that at said time there was due on appellant's mortgage on the Boyce property at least \$1,400; that appellant informed respondent that, if he would deed to it the Green property, such respondent would protect him fully against loss, whereupon respondent made a quitclaim deed to appellant conveying to it said Green property; that said deed was without consideration; that on March 25, 1897, the appellant commenced an action to foreclose its said mortgage upon the Boyce lots, obtained judgment, had it sold, and purchased it for \$1,688.50; that respondent's mortgage had been defeated, and that Boyce and wife are insolvent; that appellant failed and still fails and refuses to hold respondent harmless and prevent the loss of his claim; that respondent "discovered a fraud had been practiced on him in January, 1897," and that he immediately began an action to foreclose said mortgage against said Boyce and wife

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and the appellant; and that his lien on said property was defeated at the instance of the appellant. The complaint closed with a prayer asking the cancellation of said quitclaim deed. To the complaint the appellant demurred for the reasons: 1. That the complaint did not state a cause of action; 2. That it was uncertain, in that it did not show how or in what manner the appellant defeated respondent's mortgage. The demurrer was overruled on both grounds, and the appellant answered, denied the material averments of the complaint, and pleaded matters in estoppel by way of former adjudication between the parties about the same cause of action. The cause was tried by the court, which found the material facts alleged in the complaint to be true, making formal special findings of fact and conclusions of law, and rendered a decree in favor of the respondent, annulling and canceling the quitclaim deed to the Green property made by respondent. The appellant proposed a bill of exceptions, into which is incorporated all of the evidence introduced at the trial, numerous rulings of the court, and specifications as to wherein the evidence does not support the decision of the court, which bill of exceptions was duly settled, filed, and became a part of the judgment-roll. This appeal is upon the judgment-roll.

Numerous errors are assigned by appellant touching the action of the lower court in overruling the demurrer, in admitting evidence, and in making findings of fact and rendering judgment in favor of the respondent. While the complaint is faulty in some respects, we deem it necessary to consider only one question—that relating to the defense of estoppel set up in the answer. To sustain this defense the appellant introduced the judgment-roll in an action commenced by the respondent (plaintiff in this action), as plaintiff, against the said Boyce and wife and the appellant here, as defendants, to foreclose the said \$400 mortgage executed by said Boyce and wife to the respondent here, and to have the lien of said mortgage adjudged superior to that of the said mortgage executed by Boyce and wife to the appellant, which action was based upon the same facts as the one at bar, and in which action judgment was rendered August 16, 1898, in favor of the appellant and against respondent. The

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complaint in said former action alleged that the appellant agreed to reduce its said mortgage to \$750, while in this action the complaint alleges that the appellant represented to the respondent its mortgage amounted to only \$750, and that appellant would protect the respondent fully against loss. This and the difference in the relief demanded is practically the only difference between the two complaints.

In the former suit the court made the following findings of fact, to wit: "1. That the defendant the Co-operative Savings and Loan Association is, and was at all the times herein mentioned, a corporation organized and existing under and by virtue of the laws of the state of South Dakota. 2. That on the — day of September, 1892, for a valuable consideration, the defendants W. A. Boyce and Veronica Boyce, his wife, made, executed, and delivered to the said Co-operative Savings and Loan Association their certain mortgage for one thousand dollars upon lots 11, 12, 13, and 14 in block 295 of the townsite of the city of Pocatello, Bannock county, Idaho. 3. That on the eighteenth day of January, 1895, for a valuable consideration, the said defendants W. A. Boyce and Veronica Boyce made, executed, and delivered to plaintiff, W. H. King, their certain mortgage for \$400 upon the same property as mentioned in finding No. 2. That the consideration for said mortgage was taxes paid by said plaintiff to the county of Bannock for the delinquent taxes for the years 1893 and 1894 upon the said property, and lots 17 and 18 in block — of the said city of Pocatello, and known as the 'Green property,' the said plaintiff being the purchaser of the said property, and the whole thereof, at the tax sale for the delinquent taxes for the year 1893; and the said mortgage was given for the redemption of all of the said property from the said tax sale. 4. That at the time of the accepting of the said mortgage of Boyce and wife to plaintiff, by plaintiff, the said plaintiff had actual and constructive knowledge of the mortgage to the Co-operative Savings and Loan Association, mentioned in finding No. 2. 5. That on the third day of April, 1897, the said defendant the Co-operative Savings and Loan Association commenced an action in this court for the foreclosure of their said mortgage, making W. A. Boyce and Veronica Boyce and

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the plaintiff, W. H. King, parties defendant in said action, and that on or about the third day of April, 1897, the attorney for the said Co-operative Savings and Loan Association served the said attorney for the plaintiff, W. T. Reeves, who, defendant advised said S. C. Winters, was defendant's attorney herein, with a copy of the complaint in said action of foreclosure, which said complaint the said attorney for the plaintiff herein agreed to answer; that on the eighteenth day of May, 1897, the plaintiff herein, W. H. King, having failed to answer the said complaint, on motion of the attorney for the Co-operative Savings and Loan Association the said W. H. King was dismissed from said action, and a decree was duly entered in said action against W. A. Boyce and Veronica Boyce, and for the sale of the said lots 11, 12, 13, and 14 in block 295, as set out in finding No. 2. 6. That by virtue of said decree the sheriff of Bannock county on the eighth day of July, 1897, sold the said property at sheriff's sale, and the said Co-operative Savings and Loan Association became the purchaser thereof for the sum of \$1,700, and received the sheriff's certificate of sale therefor; that on the eleventh day of January, 1898, the said property not having been redeemed, and the time for the redemption thereof having expired, the said sheriff of Bannock county made, executed, and delivered to the said Co-operative Savings and Loan Association his deed for the same and the whole thereof, being the amount of the said decree, with costs and accruing costs. 7. That said property so sold was and is worth the sum of \$2,500, and that the plaintiff made no attempt to redeem the said property, or any part thereof, nor tendered any redemption thereof. 8. That at the time of the execution of the mortgage to King, mentioned in finding No. 3, one C. J. Johnson, who was then collecting agent for the defendant, the Co-operative Savings and Loan Association, informed the plaintiff, King, that the mortgage of the said Co-operative Savings and Loan Association would be reduced in amount the sum of \$400, which was not done by the said Co-operative Savings and Loan Association. 9. That the said C. J. Johnson had no power or authority from the said defendant, the Co-operative Savings and Loan Association, as agent or otherwise, to reduce

Points decided.

the amount of the said mortgage of the said Co-operative Savings and Loan Association in any amount at all, and that the said acts of the said C. J. Johnson were and are not binding on the said association."

We think that the former adjudication concludes the respondent in this action. It determines the facts and transactions upon which the fraud that he complains of in his action is based against him. Having litigated those facts in the former action, he cannot, by changing the prayer for relief, open up the same controversy, and have the same facts adjudicated again. "The doctrine is well established that a cause of action once finally determined, without appeal, or some proceeding for the annulment of the judgment between the parties on the merits by any competent tribunal, cannot afterward be litigated by a new proceeding either before the same or any other tribunal." (11 Am. & Eng. Ency. of Law, 2d ed., p. 390, and authorities cited in note.) For the foregoing reasons, the judgment is reversed, and the cause remanded to the district court, with instructions to enter judgment in favor of the appellant, dismissing the action. Costs of appeal awarded to the appellant.

Huston, C. J., and Sullivan, J., concur.

(December 22, 1899.)

IN RE JACK DAVIS.

[59 Pac. 544.]

WRIT OF MANDATE—CUSTODY OF PRISONER—CRIMINAL LAW—EX POST FACTO LAW—CHANGING PLACE OF EXECUTION—JUDGMENT.—

The provision of section 159 of the Revised Statutes of 1887 is intended as and is a general saving clause to penal statutes, amendatory and otherwise, and continues in force a statute as it existed as to all offenses committed prior to repeal, and a person convicted of an offense and sentenced to death prior to repeal must be punished under the law as it existed at the time of the commission of the offense. Act of February 18, 1899 (Session Laws 1899, p. 340), amending certain sections of the Revised Statutes of 1887, regulating the time, place and manner of in-

Argument for Petitioner.

ficting the death penalty, construed with section 159 of the Revised Statutes, is not applicable to past offenses and is prospective only in its operation.

(Syllabus by the court.)

Original application by sheriff of Cassia county to obtain custody of prisoner.

W. E. Borah, for Petitioner Burke.

The questions presented are, first: Is the new law unconstitutional and void by reason of its being *ex post facto* in this nature? Second: If so, is the old law repealed by virtue of the new law—or, in other words, under which law must the sentence resting upon Davis be carried out? So far as the new law is concerned the supreme court of the United States has held that such a law is *ex post facto* as to crimes committed prior to this passage, since it changes the punishment in such material degree as to come within the inhibition of the constitution of the United States. This being a federal question, the decision of that court must, of course, be accepted as final. While Justice Brewer, with whom concurs Justice Bradley, dissents in a very vigorous opinion, yet we have no right to assume that the court will modify its views. We must be content, therefore, with this decision so far as this hearing is concerned. (*In re Medley*, 134 U. S. 160, 10 Sup. Ct. Rep. 384.) We contend, however, that we have a statute which serves as a general saving clause for all criminal statutes, and that by reason of this general saving clause the new law did not repeal the old. The object of this statute was and is to prevent the escape from punishment of those charged with or convicted of crime when any change, either in the quality of the crime or the punishment therefor, should take place before the completion of the punishment. (Idaho Rev. Stats., sec. 159.) This statute is found in California, and has there been construed in accordance with the views for which we contend. (*People v. McNulty*, 93 Cal. 427, 26 Pac. 597, 29 Pac. 61; *People v. Vincent*, 95 Cal. 425, 30 Pac. 581.) These decisions have also been approved by the supreme court of the United States. (*McNulty v. California*, 149 U. S. 645, 13 Sup. Ct. Rep. 959;

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Vincent v. California, 149 U. S. 648, 13 Sup. Ct. Rep. 960.) Investigation discloses that similar statutes have been adopted and upheld by a great many states and often construed by the courts. (*State v. Smith*, 62 Minn. 540, 64 N. W. 1022; *United States v. Barr*, 4 Saw. 254, Fed. Cas. No. 14,527; *Kennish v. Ball*, 30 Fed. 759; *Gibson v. State*, 35 Ga. 225; *Jordan v. State*, 38 Ga. 585; *Volmer v. State*, 34 Ark. 488; *McCuen v. State*, 19 Ark. 634; *State v. Shaf*, 24 Iowa, 486; *Acree v. Commonwealth*, 13 Bush, 353; *State v. Ross*, 49 Mo. 416; *Gilleland v. ———* 9 Kan. 581; *State v. Boyle*, 10 Kan. 113; *State v. Crawford*, 11 Kan. 32; *State v. Matthews*, 14 Mo. 133; *Richardson v. State*, 3 Cold. 122; *Commonwealth v. Sherman*, 85 Ky. 686, 4 S. W. 790; Am. & Eng. Ency. of Law, sec. 437.) If the old law stands, it is quite clear that the warden is improperly withholding from the custody of the petitioner said Davis. He should be returned to the petitioner as sheriff, and authority for making such an order is especially provided for by our statutes. We think that there can be no doubt but what our statute was intended to cover such and similar emergencies as exist in this case. (Idaho Rev. Stats., sec. 8360.)

Attorney General S. H. Hays for Warden Hailey, contends:

That the Medley case may perhaps be considered as in some measure modified by the decision in *Holden v. Minnesota*, 137 U. S. 483, 11 Sup. Ct. Rep. 143. On the question of *ex post facto* laws generally, cites Am. & Eng. Ency. of Law, 2d ed., 525.

Hawley & Puckett, *amicus curiae*.

The re-enactment of a statute destroys the vitality of the old statute for any purpose. (*Sillings v. Harvey*, 6 Cal. 383; *Bardock v. Memphis*, 30 Wall. 617; *Henderson v. Tobacco*, 30 Wall. 652; *Bartlet v. King*, 12 Mass. 537, 7 Am. Dec. 99; *Commonwealth v. Cooley*, 10 Pick. 36; *Holbrook v. Nichel*, 36 Ill. 161; *State v. Andrews*, 30 Tex. 230; *Commonwealth v. Marshall*, 11 Pick. 350, 22 Am. Dec. 377; *Norton v. Folger*, 15 Cal. 284.) The rule for the construction of penal statutes is that they are to reach no further than their words. No person can be made

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subject to them by implication, and all doubts concerning their interpretation are to preponderate in favor of the accused. (Bishop on Statutory Crimes, 194; *Ex parte Kohler* 74 Cal. 38, 15 Pac. 436.) Where a statute admits of two constructions, that which operates in favor of life or liberty is to be preferred. (*Commonwealth v. Martin*, 17 Mass. 359; *Commonwealth v. Keniston*, 5 Pick. 420; *Horner v. State*, 1 Or. 267.)

SULLIVAN, J.—This is an application for a writ of *habeas corpus* made by J. E. Burke, sheriff of Cassia county, to obtain the custody of one Jack Davis who was convicted of the crime of murder and sentenced to be hung therefor. Said sentence was stayed, pending an appeal to this court, which appeal was decided against said Davis, and thereafter his execution was fixed for February 1, 1899. Thereafter, upon application for a writ of *habeas corpus* to the federal court, execution was stayed until an appeal to the federal court should be determined. On February 18, 1899, the legislature of Idaho passed an act providing that the execution of all persons on whom the penalty of death was imposed should be within the walls of the penitentiary. Thereafter the sheriff of Cassia county delivered said Davis to the warden of the state penitentiary at Boise City, Idaho. By his petition he asks that the said Davis be restored to his custody, so that the sentence of the law may be carried out provided the appeal which is now pending in the circuit court of appeals, ninth circuit, shall be decided against said Davis.

When Davis was convicted, and judgment of death passed upon him, section 8021 of the Revised Statutes read as follows:

"Sec. 8021. The judgment of death must be executed within the walls or yard of a jail, or some convenient private place in the county. The sheriff of the county must be present at the execution, and must invite the presence of a physician, the district attorney of the county, and at least twelve reputable citizens, to be selected by him, and he shall, at the request of the defendant, permit such ministers of the gospel, not exceeding two, as the defendant may name, and any persons, relatives or friends, not to exceed five, to be present at the execution, together with

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such peace officers as he may think expedient, to witness the execution. But no other persons than those mentioned in this section can be present at the execution, nor can any person under age be allowed to witness the same."

Thereafter, on February 18, 1899, said section 8021 was amended (see Sess. Laws 1899, p. 342) to read as follows:

"Section 8021. The state prison board of the state, at the expense of the state of Idaho, shall provide a suitable room or place, closed from public view within the walls of the state penitentiary, and therein erect and construct the necessary scaffolding, traps and appliances requisite for carrying into execution the death penalty; and the punishment of death must, when pronounced by sentence in this state, in each and every case, be inflicted by the warden in the state penitentiary, in a room or place, and with the appliances aforesaid, by hanging said convict by the neck until he shall be dead."

The question involved in this case is, under which law must the judgment against Davis be carried into execution—whether under the provisions of said section 8021 before amendment, or under its provision after amendment. So far as the provisions of said section, as amended, are concerned, the supreme court of the United States, in the case of *In re Medley*, 134 U. S. 160, 10 Sup. Ct. Rep. 384, 33 L. ed. 835, held that such a law is *ex post facto* as to crimes committed prior to its passage, since it changes the punishment in such a material degree as to come within the inhibition of the provisions of the federal constitution. This being a federal question, the decision of that court must be accepted as final. Therefore the execution of said judgment cannot be performed by the warden of the state penitentiary, and the warden has no right to the custody of said Davis.

The question then arises, Did the amendment of said section 8021 repeal its provisions as to the execution of the death sentence as they existed prior to the amendment, and thus leave no law under which said sentence may be executed and because thereof permit Davis to escape the judgment pronounced against him? Otherwise, to pardon him by legislation. It

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certainly was not the intention of the legislature, by said amendatory act, to make a general jail delivery of all prisoners upon whom the death sentence had been passed and not carried into execution at the date of said amendment. Said amendatory act has attached thereto the usual repealing clause declaring that "all acts and parts of acts in conflict with this act are hereby repealed." It is contended by Messrs. Hawley & Puckett, who appear as friends of the court, that said amendatory act, amending certain sections of the Revised Statutes approved February 18, 1899 (see Sess. Laws 1899, p. 340), repeals the former provisions of said sections so amended, relating to the incarceration, punishment, and execution of persons condemned to death, and for that reason, under the rule laid down in *In re Medley, supra*, there is no law by which the judgment against Davis can be executed; while counsel for the petitioner contends that section 159 of the Revised Statutes of 1887 is a general saving clause for all criminal statutes such as those under consideration, and that by reason thereof the amendatory act did not repeal the old law relative to the manner, time, and place of the execution of the death penalty. Said section 159 is as follows:

"Sec. 159. The repeal of any law creating a criminal offense does not constitute a bar to the indictment and punishment of an act already committed in violation of the law so repealed, unless the intention to bar such indictment and punishment is expressly declared in the repealing act."

The evident purpose of that statute was and is to prevent the escape from punishment of those charged with or convicted of crime, where a change is made, by amendment of the statute then in force, either in the quality of the crime or in the punishment thereof, when the amended statute is to go into effect before the completion of the punishment imposed. Said section 159 was copied from the Political Code of California (section 329), and that section has been construed by the supreme court of that state in *People v. McNulty*, 93 Cal. 427, 26 Pac. 597, and 29 Pac. 61, as a general saving clause, and under it a person who has been convicted of an offense must

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be punished under the law as it existed at the time of the commission of the offense, though the clause of the act prescribing the punishment has since been repealed by an amendment which increases the punishment. In *People v. Vincent*, 95 Cal. 425, 30 Pac. 581, the court cites with approval *People v. McNulty*, *supra*. Those decisions have been approved by the supreme court of the United States. (*McNulty v. People*, 149 U. S. 645, 13 Sup. Ct. Rep. 959, 37 L. ed. 882; *Vincent v. People*, 149 U. S. 648, 13 Sup. Ct. Rep. 960, 37 L. ed. 884. See, also, *State v. Smith*, 62 Minn. 540, 64 N. W. 1022.) Upon both reason and principle we think the rule laid down in those cases correct when applied to the construction of the provisions of said section 159. The amendments, as made by said act, do not apply to convictions for offenses committed before their enactment, and are not applicable to past offenses and are prospective only in their operation.

Under the facts of this case, as supplemented by the provisions of section 8360 of the Revised Statutes, which is as follows: "Sec. 8360. In cases where any party is held under illegal restraint or custody, or any other person is entitled to the restraint or custody of such party, the judge or court may order such party to be committed to the restraint or custody of such person as is by law entitled thereto"—the petitioner, as sheriff of said Cassia county, is entitled to the custody of said Davis. Under the law as it was before it was amended, said sheriff was the legal custodian of said Davis until the judgment of the court has been executed, and, as said law was not changed as to Davis, the sheriff remains his legal custodian, and is now entitled to his custody. It is therefore ordered that said Jack Davis be committed to the custody of the petitioner, J. E. Burke, sheriff of Cassia county, to be dealt with according to law and the authority of the court having jurisdiction in the premises.

Huston, C. J., and Quarles, J., concur.

Argument for Appellant.

(December 23, 1899.)

OREGON SHORT LINE RAILWAY v. GOODING, ASSESSOR.

[59 Pac. 821.]

TAXATION—ASSESSOR—BOARD OF EQUALIZATION—RAILROAD PROPERTY.—Property of a railroad company, other than “rolling stock” outside of the “right of way” “railroad track” as defined by the statute of this state, is assessable by the local assessor, and not by the state board of equalization.

(Syllabus by the court.)

APPEAL from District Court, Blaine County.

J. S. Waters and Hawley & Puckett, for Appellant.

The term “right of way” can only be understood as embracing the land used as a way for the road, and not such additional ground as may be used for the convenience of the railroad, but is not part of its right of way. (*Chicago etc. Ry. Co. v. Pad-dock*, 75 Ill. 616.) The case of *Oregon Short Line Ry. Co. v. Yeates*, 2 Idaho, 397, 17 Pac. 457, settles this question, in our judgment, and in effect decides that the right of way embraces only the two hundred foot strip through the center of which the main line of railway runs. Property not held or used for railroad purposes, but of which the corporation may have become owner, should be separately listed and taxed from the property used for railroad purposes. (Cooley on Taxation, p. 384, sec. 85; *Savannah etc. Ry. Co. v. Morton*, 71 Ga. 24.) • Shops owned and operated by a company for the construction and repair of its locomotives and cars are liable to taxation for local purposes as real estate, even though they have no greater capacity than is required for the work the company itself has for them to do. (*Pennsylvania etc. R. Co. v. Vandyke*, 137 Pa. St. 249, 20 Atl. 653; *Toledo etc. R. Co. v. Lafayette*, 22 Ind. 262; *Tucker v. Ferguson*, 22 Wall. (U. S.) 527; *N. & L. Ry. Co. v. Nashua*, 62 N. H. 602; *Cook v. State*, 38 N. J. L. 474.) Where a railroad company has completed its road and appendages so far as it is at present contemplated, at its several stations, the land lying outside of the railroad limita-

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tion of one hundred feet, not being in actual use, nor in present contemplation of use by the company, is liable to taxation. (*State v. Middle Tp.*, 38 N. J. L. 270.)

P. L. Williams, Joseph H. Blair, Lyttleton Price and F. S. Dietrich, for Respondent.

We contend that the evidence, spirit and intent of the statute is to clothe the state board with exclusive power to assess all railroad property used for railroad purposes. In the case of *Pennsylvania etc. R. Co. v. Vandyke*, 137 Pa. St. 249, 20 Atl. 653, there is no statutory language in any way resembling the language of the statutes of Idaho under consideration. In fact there does not seem to be any provision for the assessment of railway real estate, except by the local authorities, in addition to which there is a general assessment of the franchises of the company. (*Chicago etc. Ry. Co. v. People*, 153 Ill. 409, 38 N. E. 1075, 29 L. R. A. 69.) The act of 1895 is in substance very similar to the assessment laws of the states of Illinois and Indiana, and there is much reason to believe that the legislature was not unaware of these statutes, together with the decisions of the courts of those states construing the intent and purpose thereof. (*Chicago etc. Co. v. People*, 98 Ill. 350, 5 Am. & Eng. R. R. Cas. 94; *Peoria etc. Ry. Co. v. Goar*, 118 Ill. 134, 8 N. E. 682, 29 Am. & Eng. R. R. Cas. 189; *Pfaff v. Terre Haute etc. R. Co.*, 108 Ind. 144, 9 N. E. 93; *Chicago etc. R. Co. v. People*, 99 Ill. 464; *Chicago etc. Ry. Co. v. Cass Co.*, 8 N. Dak. 18, 76 N. W. 239.)

HUSTON, C. J.—This action was brought to restrain the defendant, as assessor of Lincoln county, from collecting certain taxes assessed against the property of the plaintiff corporation for the year 1897. Judgment was rendered in the district court in favor of the plaintiff and against defendant, and from said judgment this appeal is taken.

The only question presented by the record for our decision is, Was the assessment by the assessor of Lincoln county authorized by law? It is contended by respondent that under the statutes of Idaho all of the property, the assessment of which

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by the assessor of Lincoln county is contested by the plaintiff, should have been assessed by the state board of equalization. Whether it was so assessed by said board does not appear by the record. Section 1490, Laws of 1895, is as follows: "Sec. 1490. The state board of equalization shall have exclusive power to assess and value for purposes of taxation all telegraph and telephone lines and the 'railroad track' and 'rolling stock' of all persons, companies or corporations owning, operating or constructing any telegraph or telephone line, or railroad, wholly or partly within this state. For the purposes of this act 'railroad track' shall be deemed to include right of way, superstructures on the right of way, whether on main, side or second track, or turnouts and the stations and improvements thereon belonging to, used, operated or occupied by any person, company or corporation, owning, operating, or constructing any line of railroad, wholly or partly within this state. For the purposes of this act 'rolling stock' shall be deemed to include all movable property owned, used, occupied or operated in connection with any railroad, wholly or partly within this state. All property belonging to any person, company or corporation, owning, operating or constructing any railroad wholly or partly within this state, not included within the terms 'railroad track' or 'rolling stock' shall be assessed by county assessors as other property is assessed in this state." Section 1491, page 115, of the Laws of 1895, provides for the listing by the proper officer of any telegraph, telephone, or railroad company of the property of such company assessable by the state board of equalization, and the property therein described is as follows: "The whole number of miles of telegraph or telephone line, the number of wire, the number of instruments, the number of miles of railroad (main, side and second tracks and turnouts being separately stated), the property held for right of way, the amount and character of improvements, and the stations located on the right of way; and under the head of 'rolling stock' shall list the number of locomotives of all classes, passenger-cars of all classes, sleeping-cars, dining-cars, express-cars, baggage-cars, stock-cars, platform-cars, wrecking-cars, pay-cars, hand-cars, and all other

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kind of cars." It will be seen that the railroad track is deemed to include the right of way and any superstructures thereon, whether the same be "on main, side or second track, or turnouts, and the stations and improvements thereon belonging to, used, operated or occupied by any person," etc. The term "right of way" can only be understood as embracing the land used as a way for the road, and not such additional ground as may be used for the convenience of the railroad, but not a part of its way. (*Railroad Co. v. Paddock*, 75 Ill. 616.) This we conceive to be an entirely proper and correct definition of the right of way of a railroad company. The contention of respondent seems to us to include in the term "right of way" the entire earth, or at least so much thereof as the convenience of the railroad may seem to require, or the modesty of the company will permit them to assert. It seems to us that the statute of our state in regard to what property of the railroad company is accessible by the state board of equalization, and what by the local assessor, is entirely clear. The right of way in the present case was granted to the railroad company by the federal government. The statute of this state defines the railroad track to be the right of way and all improvements thereon, and the same is declared to be assessable by the state board of equalization, and "all property belonging to any person, company or corporation, owning, operating or constructing any railroad, wholly or partly within this state, not included within the terms 'railroad track' or 'rolling stock,' shall be assessed by county assessors as other property is assessed in this state." It seems to us entirely clear that the property in question was, under the provisions of the statutes of this state, assessable by the county assessor, and not by the state board of equalization. We are unable to see wherein the decision of the territorial supreme court in *Oregon etc. Ry. Co. v. Yeates*, 2 Idaho, 397, 17 Pac. 457, has any application to the case under consideration, as the statutes have been radically changed since that decision. The judgment of the district court is reversed, and the cause remanded for further proceedings in accordance with this opinion. Costs to appellant.

Quarles and Sullivan, JJ., concur.

Opinion of the Court—Quarles, J., on Rehearing.

ON REHEARING.

(January 27, 1900.)

QUARLES, J.—Respondent has filed a petition for rehearing, in which it complains that the decision gives the county assessor jurisdiction to assess personal property valued at \$4,657.50; that the right of way of the respondent through the one hundred and thirty-seven acre tract of land assessed is not excepted from the assessment. And it also complains that the opinion adverts to the fact that the right of way was granted to the respondent by the United States government, when the record is silent as to how it was acquired. On the hearing, the respondent waived all questions as to the sufficiency of the description, arguing and asking for a determination of one question only, to wit, whether the assessor had authority to assess said tract of land and improvements thereon at all, or not; and in its petition for a rehearing it is stated: "Hoping to secure a general, yet certain and definite, construction of the statutory language involved, as would be a guide, not only to the appellant, in the future, but to the respondent, in listing this and other property having similar features, respondent did not urge upon the court the inadequate, if not wholly incomprehensible, description entered by the assessor upon the roll, as it appears. But this description, as supplemented and explained by the map of record, includes the very roadbed of respondent's main tracks. Certainly, the court does not intend to decide that this is all within the jurisdiction of the local assessor. But if not, what portion of it is within the jurisdiction?" But for its waiver of the question, the respondent would be entitled to a modification of the assessment so as to exclude from the tract of land assessed, the right of way of respondent, both for its main line and its Wood river branch, But the entire one hundred and thirty-seven acres was assessed at the sum of \$342.50, or at the rate of two dollars and fifty cents per acre; and at the same rate the tax complained of would not exceed five dollars, so far as the right of way of respondent for its main track and track of its Wood river branch

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over the land in question is concerned. So in waiving this question the respondent submitted to no great hardship, and exhibited no great degree of liberality. We hold in this case that the right of way, track, whether main, side, or turnouts, and all improvements and superstructures upon the right of way, and rolling stock, are under the statute, to be assessed by the state board of equalization, and all other property of railroad companies is to be assessed, under the statute, by county assessors. We think the statute and the original opinion herein are both sufficiently clear. We will add that it is our duty to take judicial notice of the acts of Congress, both public and private, and of the executive of the United States government. (See Rev. Stats., sec. 5950.) The United States having granted to the respondent company a right of way two hundred feet wide, extending one hundred feet each way from the center of its main track, over the public domain, situate in Idaho, and, as it is a matter of common history that nearly all of the right of way of the respondent in this state, where located, runs over public, unsurveyed lands of the United States, it may well be regarded, when it is not shown that the respondent has acquired a less width for its right of way over private grounds, that its right of way is two hundred feet wide. We think that neither the state board of equalization nor the county assessor should have any trouble in deciding their duties in the matter of assessing railroad property, nor should the respondent have any trouble in listing its property with the proper officers for taxation. The property assessed against respondent, and which it claims is personal property, valued at \$4,657.50, is not shown by the record to be personal property. While listed under the general head of "Personal Property," yet it is described as "millsites, mills, and machinery." This does not show it to be personal property, nor does it show that such property is rolling stock, within the meaning of the statute. Apparently, the property described as "millsites, mills, and machinery" is improvements and fixtures upon real estate. The description is bad, but defects of description were waived at the hearing by the respondent. Such property, when not situated on the right of

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way, is assessable by county assessors. We think a rehearing should be denied, and it is so ordered.

Huston, C. J., and Sullivan, J., concur.

(December 27, 1899.)

BOISE CITY v. BOISE RAPID TRANSIT COMPANY.

[59 Pac. 716.]

CHARTER OF BOISE CITY—POWER TO DECLARE WHAT IS, AND TO ABATE NUISANCE.—By the charter of Boise City the mayor and common council are empowered to declare what is a nuisance, and are empowered to abate a nuisance.

DITCH—EXTENSION OF STREETS OVER.—When a ditch is constructed over public land and thereafter such land is entered by the probate judge as a townsite, and streets are laid out across such ditch, and in the course of time it becomes necessary to bridge such ditch for the reasonable use of the street by the public, it is the duty of the owners to construct such bridge at their own expense.

OBSTRUCTION OF STREET—OWNER OF PROPERTY.—The ownership of property is held subject to the restriction that it must be so used as not to injure others, or obstruct the free use of a street.

DUTY OF OWNER TO BRIDGE DITCH—PUBLIC NUISANCE.—The city having extended its limits and platted its streets across said ditch, the owner thereof must bridge the same, at his own expense, whenever such ditch obstructs the free passage or use of such streets. If it fails to do so, the ditch becomes a public nuisance, and may be bridged by the city, at the expense of the owner.

(Syllabus by the court.)

APPEAL from District Court of Ada County.

C. C. Cavanah, for Appellant.

This action was brought in compliance with sections 935, 968, and 969 of the Revised Statutes of Idaho, which said section 968 was, on the fifteenth day of March, 1899, amended by our legislature. (Idaho Rev. Stats., secs. 968, 969; Sess. Laws 1899, p. 405.) The above statutes require all persons who run water across any public road, street, or highway in this state, to construct a ditch of sufficient size to carry all such

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water, and must build and keep in repair, at the expense of such person, a good, substantial bridge over such ditch. An interpretation was placed upon said sections 968 and 969 by this court. (*City of Lewiston v. Booth*, 2 Idaho, 692, 34 Pac. 809; *Town of Clay v. Hart*, 25 Misc. Rep. 110, 55 N. Y. Supp. 43; *Stufflebeam v. Montgomery*, 3 Idaho, 20, 26 Pac. 125.) The universal rule, as we understand it, is that anything which menaces, endangers or puts in jeopardy citizens passing along the public highway is a public nuisance. (Idaho Rev. Stats., sec. 3620, 4529; Angel on Highways, 227; *Parker v. Macon*, 39 Ga. 725, 729, 99 Am. Dec. 486; *State v. St. Louis Board of Health*, 16 Mo. App. 8; *Bond v. Smith*, 44 Hun, 219, 222; Wood on Nuisances, 1; 2 McClain on Criminal Law, 1169; *State v. Louisville etc. Co.*, 86 Ind. 114; *Waterford Township Co. v. People*, 9 Barb. 161.) It is a nuisance at common law for a person to maintain an obstruction in a public highway. (Charter of Boise City, sec. 5, subds. 8, 14.) Every state, city or town has jurisdiction over, and authority to compel persons to remove and abate nuisances maintained or placed upon the streets or elsewhere, as such authority comes within the exercise of police powers, which are necessary to the safety of the public. (*Theilart v. Porter*, 14 Lea, 622, 52 Am. Rep. 173; *Kansas City v. McAleer*, 31 Mo. App. 333, 336; *Manhattan Mfg. etc. Co. v. Van Kensen*, 23 N. J. L. 251; *Kennedy v. Phelps*, 10 La. Ann. 227; *Mayor and Council of Monroe v. Gerspach*, 33 La. Ann. 1011, 2 Dillon on Municipal Corporations, 782; *Springfield v. Connecticut River etc. Co.*, 4 Cush. 63; *Easton etc. Co. v. Greenwich Twp.*, 25 N. J. Eq. 563; *Stearns Co. v. St. Cloud etc. Co.*, 36 Minn. 425, 32 N. W. 91; *State v. Atkinson*, 24 Vt. 448.) The defendant can acquire no right by prescription to continue a public nuisance. (*Drew v. Hicks* (Cal.), 35 Pac. 563; *People v. Gold Run etc. Co.*, 66 Cal. 152, 56 Am. Rep. 80, and note, 4 Pac. 1152; *Bowen v. Wendt*, 103 Cal. 236, 37 Pac. 149; *Wright v. Moore*, 38 Ala. 593, 82 Am. Dec. 731; *Mills v. Hall*, 9 Wend. 513; *Pettis v. Johnson*, 56 Ind. 139; *Boston Rolling Mills v. Cambridge*, 117 Mass. 396; *State v. Franklin Falls Co.*, 49 N. H. 240, 6 Am. Rep. 513.)

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George Ainslie, John J. Blake and W. E. Borah, for Respondent.

At the time when respondent's ditch was constructed, the land over which it ran was part of the public domain, and Congress, by its acts, recognized, acknowledged, and confirmed the rights of owners of canals and ditches constructed on the public lands. (Act of Congress, July 26, 1866, 14 Stat. at L. 261.) As to the canal of defendant: So far as it ran through the land of the United States it was an unequivocal grant of the right of way, if it was no more. As the plaintiff's right commenced subsequent to this statute, it took the title subject to this right of way, and cannot now disturb it. (*Broder v. Natoma Water & Mining Co.*, 101 U. S. 274, citing *Atchinson v. Peterson*, 20 Wall. 507; *Basey v. Gallagher*, 20 Wall. 670; *Forbes v. Gracey*, 94 U. S. 630.) "When a city has acquired the fee and control of its streets, in trust for the public, subject to the previous grant and dedication of a right of way for an irrigating and milling ditch, it must repair and render them passable, as the public necessity and convenience require, without interfering with the rightful and accustomed use of the ditch." (*City of Denver v. Mullen*, 7 Colo. 345, 3 Pac. 693.) If a highway be located over watercourses, either natural or artificial, the public cannot shut up these courses, but may make the road over them by the aid of bridges. (*Perley v. Chandler*, 6 Mass. 453-457, 4 Am. Dec. 159. To the same effect: *Lowell v. Proprietors of Locks and Canals*, 104 Mass. 18-28.) A canal company is not bound by the principles of the common law, independent of its charter, to erect or maintain a bridge over the canal where a highway is laid out over the same after its construction. (*Morris Canal Co. v. State*, 24 N. J. L. 62; *Town of Providence v. Dyerville Mfg. Co.*, 13 R. I. 45; Angell on Highways, sec. 57.)

SULLIVAN, J.—This action was brought to recover \$194.80 alleged to be due the appellant, Boise City, for money expended in the construction of a certain bridge across the respondent's water ditch, where said ditch crosses Fifth street of said city. The respondent answered, and the cause was heard upon an

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agreed stipulation of facts. Judgment was entered in favor of the respondent. A motion for a new trial was interposed by the appellant and overruled by the court. This appeal is from the judgment and the order denying the motion for a new trial.

Several errors are assigned, all to the effect that the finding of facts is not supported by the evidence. It is admitted in the agreed stipulation of facts: That the respondent, the Boise Rapid Transit Company, is a corporation duly organized and acting under the laws of the state of Idaho, and has been such since the thirteenth day of August, 1890, and since that date has been the owner of, and has operated and controlled, the water ditch referred to in the complaint. That the water running through said ditch is owned and used by the respondent for the purpose of carrying on and operating its street railway in said Boise City. That during the year 1863, the said water ditch was constructed by respondent's predecessors in interest, and has during all of the time since its construction been running in its present course. That a patent from the United States to the lands over which said ditch extends was issued to the mayor of Boise City, May 2, 1870. That on the eleventh day of January, 1866, the appellant was duly incorporated as a municipal corporation under the name of "Boise City," and at that time said Fifth street was laid out as a street and public highway, and has ever since been used as a street and public highway of said city, and was within the corporate limits thereof, but that said street was not extended farther south than across Front street of said city, until the Davis addition became a part of said city, in the year 1892. That said ditch and said Fifth street, and the other streets referred to in said complaint, to wit, Seventh, Front, and Eighth streets, intersect and cross each other. That on the twentieth day of July, 1899, a certain bridge across said ditch, located where said ditch and Fifth street intersect each other, became and was out of repair and dangerous, and wholly unsafe and insufficient for public travel. That on the twenty-fifth day of July, 1899, the street commissioner served legal notice upon the respondent of the dangerous and unsafe condition of said

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bridge, and notified respondent to repair the same. That respondent failed, neglected and refused to do so. Thereafter, on August 3, 1899, said city constructed a bridge across said ditch at said place at its own expense, of \$194.80. That said respondent has been requested to pay said sum, but has failed and refused to do so. That since said notice was served on respondent, it has repaired a bridge over said ditch where said ditch runs across said Eighth street. The notice above referred to also notified respondent of the unsafe and dangerous condition of the last-mentioned bridge, and notified respondent to repair the same. That in the year 1894, appellant notified respondent to construct a bridge across said ditch where it crosses said Fifth street, but that respondent failed and refused to do so, and thereafter appellant constructed said bridge at his own expense, and that no proceedings have been had to recover from respondent the sum so expended. That respondent has not built or repaired or maintained said bridge in any way or manner. That on the twelfth day of September, 1890, the respondent received a deed of conveyance whereby said ditch was conveyed to it. Under the foregoing facts, counsel for respondent contend that, as its predecessors constructed said ditch long prior to the time that said Fifth street was platted or dedicated to the public as a street or highway, it is the duty of the city to bridge said ditch at its own expense, if the public safety and convenience require that to be done, and that said street was dedicated to the use of the public, subject to the pre-existing rights of respondent and its predecessors, and for that reason the city must bridge said ditch, if the public necessities require it.

The only question in the case is, Upon whom devolves the duty of constructing the bridge over respondent's ditch across Fifth street? The record shows that said ditch must be bridged at said crossing, as said ditch is shown to be an obstruction to the free and customary use of said street by the public. Said obstruction is a public nuisance. Said ditch at said point may not have been a public nuisance at the time of its construction, but conditions have changed since then. What was noth-

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ing but wild land, covered with sagebrush, at the date of the construction of said ditch, has become a thickly settled part of said Boise City; and said Fifth street, where said ditch crosses it, is very much used by the public. Said ditch, unbridged, would be a great obstruction to the free use of said street, and was a public nuisance.

Subdivision 8 of section 3 of the charter of Boise City, as amended by the laws of 1899 (page 311), provides, among other things, that the mayor and common council shall have full power and authority within Boise City to prevent and abate nuisances, and generally to determine and declare what shall be deemed nuisances, and to provide for the removal and abatement thereof. The record shows that said bridge across said street was in a dangerous and unsafe condition; that said ditch was maintained by respondent in that condition; that the proper authority of said city notified respondent of that fact, and to repair said bridge, which it refused to do. The maintenance of said bridge in its then unsafe condition obstructed the free use of said street by the public, and was clearly a public nuisance, as defined by sections 3620, 3621 of the Revised Statutes. While it appears from the record that said ditch was constructed in its present location prior to the time said Fifth street was laid out across it and dedicated to public use, it is also true that one James H. Slater and his associates, who were owners of said ditch in 1866, made application to the territorial legislature of Idaho, to grant them a right of way for said ditch through Boise City, which application was granted by an act entitled "An act to grant James H. Slater and his associates right of way for a water canal or ditch in Ada county," approved January 11 A. D. 1866. (See Laws 3d Sess., p. 239.) The first section of said act grants said Slater and his associates a right of way for a canal or ditch, of a capacity not to exceed three thousand inches, for a distance of three miles from a point then marked as the head of said ditch, on the ranch of Mooney & Co.; thence through Front street, in Boise City; and thence down the valley of Boise river. The second section provides that the owners of such ditch may sell the water conducted by said ditch for

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milling, irrigating or other useful purposes. The third section provides that said grant shall continue ten years from and after the approval of said act. The fourth section provides, in case any parties owning grounds over which the said ditch may run sustain damage thereby, the manner and method of assessing such damages. This act, taken as a whole, indicates that said ditch was not constructed, or at least completed, when said act was passed. But it is a stipulated fact, that said ditch was constructed in 1863, and this suit must be decided on the facts as stipulated. Some stress is laid on the fact that the third section of said act provides that the grant of said right of way should continue for ten years. That fact, however, cuts no figure in the determination of this case. Conceding that the respondent and its predecessors in interest had a perpetual right of way, acquired prior to the incorporation of said city, and prior to the extension of said Fifth street over and across said ditch and right of way, said right of way and ditch were acquired, constructed, procured, purchased, and held subject to the restriction that said ditch must be so used as not to injure the public. Every right, from absolute ownership of property to a mere license or easement, is held subject to the rule that it shall be so used and exercised as not to injure others. And the rule is well settled that, when a city extends its limits, offensive trades and businesses must be removed beyond the immediate neighborhood of residences of citizens. (*City of Kansas v. McAleer*, 31 Mo. App. 433; *Wier's Appeal*, 74 Pa. St. 230; *Coates v. Mayor etc.*, 7 Cow. 585.) Though at the same time said ditch was constructed there may have been no necessity for bridging the same, the owners were bound to know that said Boise City, through which it ran, might become a populous city, and in such case said ditch would become a public nuisance unless it was bridged and covered in places so as to protect the public from danger and injury, and to give the public the free use of streets. And when that period should arrive, as it is shown by the record it has, the owners thereof would be amenable to the laws for the suppression of nuisances. The respondent must so conduct its said ditch business, and so bridge

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and place guards about said ditch, as to protect the public from danger and injury therefrom, at its own expense. If it does not do so, it comes in conflict with the law for the suppression or removal of nuisances, and must yield to it. The police power of Boise City is amply sufficient to compel the inhabitants or property owners thereof to so conduct their affairs and use their property in a manner as not to be injurious to health, or indecent or offensive to the senses, and not to obstruct the free passage or use of streets in the customary manner.

But it is argued by the respondent that the act of March 15, 1899, amending sections 935, 968 of the Revised Statutes (Sess. Acts 1899, p. 405), exempts respondent from maintaining bridges over its said ditch, where it runs over the public highway, in repair. To this argument we reply that said act is prospective in its operation, and does not apply to ditches and canals that had been constructed across public highways prior to the time said act went into effect. It is doubtful whether the legislature has power to take away from the public, by legislation, a right which had vested in the public prior to such legislation.

The conclusion we reach is that it was the duty of respondent to build said bridge, and as it failed and neglected to do so, and the city built it, the city may recover the cost of building the same from respondent. The judgment is reversed and the cause remanded, with instructions to enter judgment in favor of the appellant, as prayed for in the complaint. Costs of this appeal are awarded to the appellant.

Huston, C. J., and Quarles, J., concur.

Argument for Appellants.

(December 28, 1899.)

REYNOLDS v. BOARD OF COMMISSIONERS OF
ONEIDA COUNTY.

[59 Pac. 730.]

CONSTITUTIONAL LAW—DELEGATION OF POWER.—A power or function vested in one department body, board, or tribunal by express constitutional provision, cannot be delegated by such department, body, board or tribunal to another department, body, board or tribunal.

SAME—FIXING SALARIES OF COUNTY OFFICERS.—Act of March 2, 1899, provides a uniform basis, reasonable compensation, throughout the state, for the fixing of salaries of county officers; is general in its operation; does not delegate legislative functions, does not contravene the constitution, and is a valid act. *Stookey v. Board of County Comms.*, ante, p. 542, 57 Pac. 312, affirmed.

APPEALS FROM ACTION OF COMMISSIONERS.—The action of the board of commissioners in fixing salaries of county officers, under act of March 7, 1899, is not final, but subject to appeal.

SAME—FINDINGS OF FACT.—Upon trial of appeal from order of a board of county commissioners, findings of fact should be made, unless waived as provided in section 4405 of the Revised Statutes.

JUDICIAL DISCRETION.—When a board of county commissioners, in exercising a discretionary power, make an order, such order will not be disturbed on appeal, except in case of clear abuse of such discretion.

(Syllabus by the court.)

APPEAL from District Court, Oneida County.

D. W. Standrod and J. W. Eden, for Appellants.

It is true that our supreme court has suggested in the case of *Stookey v. Board of County Comms.*, ante, p. 542, 57 Pac. 312, that an appeal would lie from these orders, the same as in other cases. The question of an appeal from an order of this character was not before the supreme court in that case, however, and we beg leave to submit that an appeal was not contemplated by the statute known as the "county salary bill," and that appeals from orders of this character have never been allowed by the courts, even under a statute so broad as the provisions of our Revised Statutes, section 1776, providing for appeals by "any person aggrieved." The power conferred upon the board of

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commissioners by the salary bill is in the nature of legislative—not in a literal sense legislative, but in the broader sense—and when the board under this statute fixes the salaries, it acts as a legislative body thus far and does not act judicially. The distinction between a judicial and legislative act is well defined. The one determines what the law is and what the rights of parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it. (Throop on Public Officers, sec. 532; *Mabry v. Baxter*, 11 Heisk. (Tenn.) 682.) The action of the commissioners in fixing the salaries was essentially the exercise of a legislative power, because they established by their order what the law should be in the future, and not what any officer was entitled to for services already rendered. (Cooley's Constitutional Limitations, 113; *Nebraska Tel. Co. v. State*, 55 Neb. 627; *Stokey v. Board of County Commrs.*, ante, p. 542, 57 Pac. 312; *Smith v. Strother*, 68 Cal. 194, 8 Pac. 852.) The power to fix the salaries, being a legislative function, cannot be given by the legislature to the judiciary. (*Norwalk St. Ry. Co.'s Appeal*, 69 Conn. 576, 37 Atl. 1080, 38 Atl. 708, 39 L. R. A. 794; *Shepherd v. City of Wheeling*, 30 W. Va. 479, 4 S. E. 635.) An appellant, to obtain a reversal in cases which involve the exercise of discretion must show the denial of a legal right. (2 Ency. of Pl. & Pr. 410; *Howell v. Mills*, 53 N. Y. 322.)

George E. Gray and Dietrich, Chalmers & Stevens, for Respondents.

"Sec. 1776. An appeal may be taken from any order, decision or action of the board while acting in an official capacity, by any person aggrieved thereby, or by any taxpayer of the county when any demand is allowed against the county, or when he deems any order, decision or action of the board illegal or prejudicial to public interests." (*Stokey v. Board of County Commrs.*, ante, p. 542, 57 Pac. 312.) But counsel say the expression of the court in *Stokey v. Board etc.* was unnecessary, and is mere *obiter*. In one sense possibly it was not necessary, but in no real sense is it *obiter*. Essentially it is a vital part of the decision. The court had under consideration the constitutional-

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ity of the act. The inference from a careful reading of the decision is irresistible that the court reached the decision that the act was not violative of the spirit of the constitution, upon the theory and condition, and not otherwise, that the power conferred upon the board was not absolute, unreasonable and despotic, but a discretionary power, to be exercised in good faith and in reason, and subject to review by the courts and to such theory and condition the court concluded it best to give definite expression,

QUARLES, J.—At the general election in 1898, D. J. Reynolds was elected to the office of clerk of the district court, and ex-officio auditor and recorder, in and for Oneida county; P. C. Bingham was elected to the office of sheriff of said county; J. E. Dalley was elected to the office of superintendent of public schools of said county; and Alice Thews was elected to the office of treasurer of said county. At the April meeting, 1899, of the board of county commissioners in and for said county, said board made an order, under the provisions of the act of March 7, 1899 (Sess. Acts 1899, pp. 405-407), fixing the salaries of the different county officers in and for said county. The salaries of the officers in question were fixed by said order as follows, to wit: Clerk of the district court and *ex-officio* auditor and recorder, at the sum of \$900 per annum; sheriff, at \$900 per annum; superintendent of schools, at \$500 per annum; and treasurer, at \$500 per annum,—for 1898 and 1899. From said order four several appeals were taken by the officers above named, respectively, to the district court, and by stipulation it was agreed at the commencement of the hearing in the district court that said four appeals “might be tried together, and that the judgment entered by the court might modify or affirm the order of the board of commissioners appealed from so as to cover the amount of salary to be allowed the respective officers involved in said appeal, as though each appeal had been heard separately, and a separate judgment entered in each thereof.” The district court rendered judgment that the said order of the board of county commissioners be modified as follows, to wit: “The decision of the court is that the order of the board of county commissioners hereto appealed from is remanded to said board with

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instructions that they modify said order by striking out from the salary of county treasurer the figures '\$500,' and insert in lieu thereof the figures '\$700'; strike out from the salary of sheriff the figures '\$900,' and insert in lieu thereof the figures '\$1,400'; strike out from the salary of the clerk of the district court the figures '\$900,' and insert in lieu thereof the figures '\$1,500'; strike out in the salary of the superintendent of schools the figures '\$500,' and insert in lieu thereof the figures '\$800.' Each party to this action to pay his own costs." From said judgment of the district court the appellants, the board of county commissioners, appeal to this court.

The appellants contend that the judgment should be reversed on four different grounds, viz.: 1. Because the court erred in overruling the objection of the appellants to the introduction of any evidence; 2. Because there are no findings of fact that support the judgment; 3. That the power to fix the salaries in question is a legislative function, and therefore not reviewable by the courts; 4. That in making the orders appealed from the board of commissioners were exercising a discretionary power, and violated no law, and therefore the said orders could not be reviewed upon appeal. We will discuss the different questions involved without reference to the order in which they are stated.

It is a well-settled rule that a power or function vested solely in one department, body, board or tribunal by express constitutional provision cannot be delegated by such department, body, board or tribunal to another department, body, board or tribunal. The legislature cannot delegate the functions expressly vested in it by the constitution to boards of county commissioners or to the judiciary. If, as contended by appellants, the act in question, popularly known as the "Salary Bill," delegates to the board of county commissioners in the various counties a legislative power in the matter of fixing the salaries of county officers, then the said act should be held unconstitutional and void. But we do not so consider the act. It does not vest or attempt to vest in the board of commissioners the power to make law. The act in question is of general and uniform operation throughout the state. It fixes the basis upon which the salary of county officers in each county in the

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state is to be fixed. That basis is the same in each, and is reasonable compensation for the services to be performed, taking into consideration the character of the services, amount of labor to be performed, and such surrounding circumstances as affect the cost of living and supporting one's self at the county seat of his county compatible with the dignity of the office to which he has been elected. We do not think that the legislature intended that any of the officers whose interests are involved should receive such remuneration as is paid to a common laborer, but that their compensation should be reasonable, taking into consideration all of the circumstances. The duty which devolves upon the county commissioners under the act in question is a delicate, and will generally be found to be a difficult, one. They are called upon to exercise a judicial discretion, and to act so as to carry out the intent of the statute, with due regard for the rights and interests of both office-holder and taxpayer. Their action involves judicial discretion. They act, not as a legislative body, but *quasi* judicially. More or less trouble will grow out of their actions under said statute. They have conflicting interests to consider and determine. On the one hand, office-holders will desire large salaries, while the taxpayers will desire the salaries fixed as low as possible. But the interests of all—both office-holder and taxpayer—demand that salaries should be fixed at such sums as will reasonably compensate each officer for his time and labor, taking into consideration the qualifications necessary to be possessed by each county officer, and the responsibilities of his office. All of these matters should be carefully investigated and determined by the board of commissioners. The board should exercise the discretion vested in it with due regard for the rights of all parties concerned. It was not intended by the legislature that the action of the board of commissioners should be final, or that such board might act arbitrarily, through mere whim or caprice. Section 1776 of the Revised Statutes, as amended by act of February 14, 1899 (Acts 1899, p. 248), provides that "an appeal may be taken from any act, order or proceeding of the board, by any person aggrieved thereby, or by any taxpayer of the county when any demand is allowed against the county or when he deems any such act, order or proceeding

appeal
not final
provided in
the
act.

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illegal or prejudicial to public interests." And there is nothing in the salary bill (the act under consideration) which excepts it from this general rule. Hence we are compelled to hold that it was the intention of the legislature in passing the act in question that appeals should lie from orders made by the board fixing salaries of county officers. In entertaining such appeals, the courts are not exercising legislative functions. It was proper for the court to hear evidence, and necessary for it to do so.

There are no formal findings in the record, such as are contemplated by section 4405 of the Revised Statutes. We find an expression of the opinion of the trial judge in the record, which is designated "Decision, findings, and conclusions," and which ends with the order hereinbefore quoted, as follows:

"This case is an appeal from the order of the board of county commissioners fixing the salaries of certain county officers. The point involved in the appeal is whether the board of county commissioners abused the discretion invested in them by the legislature in fixing the salaries of said county officers. The reason for the legislature delegating this power and discretion to the board of county commissioners was the fact that the different counties of the state, as to matters of territory, population, and expense of running the same, are so widely different that no general legislation could cover the subject in a way that would be right and just to all the counties, and for the best interests of the general public. The business of the counties must be carried on by the officials selected by the people, and the policy of the law is that such compensation should be paid them as will insure the efficient, business-like, and economical administration of the affairs of their respective offices in a manner provided by law. The law requires that the county officers shall keep their offices open daily between certain hours, and that certain ones shall have their residence at the county seat. The law contemplates that the time and services of the county officials shall belong exclusively to the public within official hours. Hence they are effectually cut off from other avocations. It is not the policy of the law, the wish of the people, or in the interest of public economy that the compensation of county officials should be placed on a niggardly footing, totally inadequate to the decent

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administration of public affairs. Neither is it the policy that these officials should be allowed extravagant salaries, beyond all reason. But the intention of the legislature was that the boards of county commissioners in the various counties should take into consideration the work and time consumed in the various offices, the expense connected with the same, the self-sustaining revenue therefrom, the responsibilities attached thereto, the bonds under which the parties are placed, and all the circumstances and conditions connected therewith, and from all these determine what would be a proper and just compensation for their services. The question is not what men could be hired for to perform these services, for men cannot be hired to fill these offices. They are elected by the people; are representative men, in whom the people have confidence, and whom the people have said should administer their public affairs during the ensuing two years. The question to be determined is what amount of annual salary shall be paid them for decently, respectably, and officially representing the welfare of the county, so that they may not only live and breathe out an existence, but also that they may derive from their positions a fair and reasonable profit, the same as ordinary mortals have a right to expect in other affairs of life. The public expect these officials to give their time and best energies to their public duties, and the people, in return, expect they shall have due and proper compensation therefor. Stop all extravagances in county matters; let honesty, fidelity, and capability be the paramount considerations; pay your county officials living salaries, commensurate with their duties and responsibilities—and the people will say 'Amen' to this kind of a programme, for it is right, and the true policy of the law.

"After due consideration of the evidence introduced in this case, both by appellants and respondents, the court has arrived at the following findings of fact and conclusions of law in the appeal herein submitted: 1. That the county commissioners fixed the salaries of the appellants herein on the eleventh day of April, A. D. 1899, respectively, as follows: Treasurer, \$500; sheriff, \$900; clerk of district court, \$900; superintendent of schools, \$500. The order does not state if these salaries were annual, but the court infers such was the intention. 2. The

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board of county commissioners did not take into consideration, as they should, the income derived from the offices for the county, the time consumed, and nature of the labors and responsibilities attached thereto, but based their action on a rigid zeal for economy to the taxpayers, that did injustice to the appellants, and a policy that would result, if persisted in, in placing the affairs of the county in incompetent hands, and result in the officials shirking their duties. The commissioners did not use their discretion in this matter as wisely and prudently as they should."

This paper might be regarded as findings of fact and conclusions of law, but, as contended by appellants, they are not sufficient. We think the trial judge evinced a correct and comprehensive view of the object of the statute under consideration. The true question to be determined on the appeal is, Did the board of commissioners abuse the discretion vested in it in making the order in question? To determine this question, it was necessary to hear evidence bearing upon the numerous points to be considered. And findings, when not waived as provided by section 4405 of the Revised Statutes, *supra*, should be made, showing the facts upon which the abuse of discretion is predicated. The action of the board should not be disturbed unless there is a clear abuse of discretion shown, which cannot be shown merely by the opinion of the district court.

Appellants argue that no law was violated by the board, and that the respondents had no legal rights to be violated at the time the salaries were fixed; that whatever legal right they have to compensation was created by the order appealed from. We do not agree with this contention. The act in question vests in each county officer in the state the right to compensation which is, within the maximum and minimum prescribed, reasonable, considering the circumstances surrounding and affecting each office. Each taxpayer and office-holder has the right to have the board of commissioners in his county exercise its discretion in the matter of fixing such salaries as will afford to each officer reasonable compensation, thus protecting public interests. Each taxpayer also has a legal right to have the county treasury protected against an abuse of the discretion vested in the board, by way of profligate extravagance. If the theory of the appellants be

Points decided.

correct, that the action of the board is final and cannot be reviewed by the courts, the taxpayers in one of the smaller counties may see the salaries fixed at the maximum, without regard to the amount of labor to be performed, or other circumstances, contrary to public interests, and be powerless to remedy the wrong. No such thing was contemplated. The theory upon which the case of *Stookey v. Board of County Commrs.*, ante, p. 542, 57 Pac. 312—which is hereby affirmed—was decided, is that the boards of commissioners must, within the discretion vested in them, allow reasonable compensation by way of annual salaries, when acting under the provisions of the act in question. It was only upon the theory that we could hold said act to be general and not special legislation. Under this theory, the act is uniform in its operation throughout the state. Under any other theory, we would be compelled to hold it local and special, and inhibited by the constitution. While it seems that the board of commissioners fixed the salaries in question very low, and while the amounts fixed by the district court do not seem extravagant, yet it does not sufficiently appear from the record before us that the board of commissioners abused its discretion in making the order appealed from. The cause is remanded to the district court for further proceedings consistent with the views herein expressed; each party to pay its own costs upon this appeal.

Huston, C. J., and Sullivan, J., concur.

(January 16, 1900.)

STOCKER v. KIRTLEY.

[59 Pac. 891.]

PRACTICE—INJUNCTION—DAMAGES.—In a case when a perpetual injunction is prayed for, and also damages, the court must try the issue raised as to the injunction, and, on demand of either party, submit the question of damages to a jury and thereafter enter the proper judgment.

SAME—CAUSES CANNOT BE TRIED PIECE-MEAL.—It is error to try the issue as to the injunction, enter judgment thereon, and continue the question of damages to a subsequent term of the court. Causes cannot thus be tried piece-meal.

Argument for Appellant.

SAME—EVIDENCE.—All who are neither parties to a judgment nor the privies to such parties are not bound by such judgment.

COURT MUST GRANT ANY RELIEF EMBRACED WITHIN THE ISSUES.—

Under the provisions of section 4353 of the Revised Statutes, when an answer is filed, the court may grant any relief consistent with the case and embraced within the issues.

WATER RIGHT—DITCH.—One may own a ditch, without owning a water right and may protect it from injury.

(Syllabus by the court.)

APPEAL from District Court, Lemhi County.

Redwine & Boyd, for Appellant.

The court erred in admitting the judgment-roll in the action of *Michael Boyle, Thomas Boyle and Murray Williams v. Thomas McGarvey and others*. It is an elementary principle of law that a judgment can have no binding force upon anyone a stranger to the action. (2 Black on Judgments, sec. 600.) The evidence having shown clearly that the company used all the water, it was competent to prove the declarations of the users under a claim of ownership by adverse user. These declarations would be the strongest possible evidence tending to prove adverse user. Bearing upon this point, we refer to *Cannon v. Stockmon*, 36 Cal. 536, 95 Am. Dec. 205; *Lick v. Diaz*, 44 Cal. 479; *Stockton Sav. Bank v. Staples*, 98 Cal. 189, 32 Pac. 937; 1 Am. & Eng. Ency. of Law, 304, note. If an injunction should be granted for every slight damage as the facts in this case clearly show, the leading industry would be greatly retarded for there is scarcely a mining stream in this part of the state not used for mining purposes. Injunction does not necessarily follow damages. (*Robb v. Carnegie Brothers & Co.*, 145 Pa. St. 324, 27 Am. St. Rep. 694, 22 Atl. 649; High on Injunctions, secs. 749, 752; Lindley on Mines, sec. 842; *Fitzpatrick v. Montgomery*, 20 Mont. 181, 63 Am. St. Rep. 622, 50 Pac. 416.) This court has power to order such judgment as the evidence warrants. In chancery cases, the supreme court, on appeal, has full power to correct the errors of the court below in whatever shape or by whatever party the appeal is taken up. (*Grayson v. Guild*, 4 Cal. 122; Idaho Rev. Stats., sec. 3818; *McAfee v. Reynolds*, 130 Ind. 33, 30 Am. St. Rep. 194, 28 N. E. 423.)

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John H. Pagdham and W. T. Reeves, for Respondent.

The well-settled rule of law that the refusal of the court to grant a new trial will not be reviewed on appeal, unless there is a gross abuse of discretion, the motion being addressed to the sound discretion of the trial court. (*Speck v. Hoyt*, 3 Cal. 421; *Hastings v. Steamer U. S.*, 10 Cal. 341; *Gerald v. Brunswick & Balke Co.*, 67 Cal. 124, 7 Pac. 306; *Pico v. Cohn*, 67 Cal. 258, 7 Pac. 680; *Pierce v. Schaden*, 55 Cal. 406; *Phelps v. Union etc. Co.*, 39 Cal. 410; *Pacific etc. Co. v. Telegraph Co.*, 79 Cal. 340, 21 Pac. 840.) We contend that if there is a conflict of evidence this court will not interfere with the findings; that before this court will review the action of the lower court in this regard there must be a failure of evidence on the fact found. (*Speck v. Hoyt*, 3 Cal. 421; *Wheeler v. Hays*, 3 Cal. 287; *Cole v. Bacon*, 63 Cal. 571; *Putman v. Lamphire*, 36 Cal. 151.) No party has the right to so pollute the waters of a stream, by depositing tailings therein, so that in using it below for agricultural purposes the land would be injured and made unfit for use on account of sand, sediment and debris settling thereon and in support of this contention, we cite the following authorities: *Fitzpatrick v. Montgomery*, 20 Mont. 181, 63 Am. St. Rep. 622, 50 Pac. 416; *Hobbs v. Canal Co.*, 66 Cal. 161, 4 Pac. 1147; *People v. Gold Run Co.*, 66 Cal. 138, 56 Am. Rep. 80, and note, 4 Pac. 1152; *Levaroni v. Miller*, 34 Cal. 231, 91 Am. Dec. 692, and note; *People v. Elk River Mill etc. Co.*, 107 Cal. 214, 48 Am. St. Rep. 121, 40 Pac. 486; *Woodyear v. Schaefer*, 57 Md. 1, 40 Am. Rep. 419; *Robinson v. Coal Co.*, 57 Cal. 412, 40 Am. Rep. 118; *Columbus etc. Co. v. Tucker*, 48 Ohio St. 41, 29 Am. St. Rep. 528, and note, 26 N. E. 630; *Mississippi Mills Co. v. Smith*, 69 Miss. 299, 30 Am. St. Rep. 546, and note, 11 South. 26. Although appellant is conducting a lawful business it must be conducted in a lawful manner and not so as to injure others. (*Hobbs v. Amador etc. Co.*, 66 Cal. 161, 4 Pac. 1147, and authorities there cited.)

SULLIVAN, J.—This is an action to enjoin the defendant (who is appellant here) from running placer mining debris, consisting of rock, sand, gravel, and sediment, into plaintiff's irri-

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gating ditch and upon his land, and for damages. The complaint specifically prays for \$400 damages for a perpetual injunction, and "for such other proper and equitable relief as to the court shall seem meet, and for costs of suit." Among other allegations, the complaint alleges ownership in the plaintiff of a certain water right, consisting of one hundred and forty inches, of the water of Kirtley creek, but no specific prayer for a decree to that effect is contained in the complaint. The answer contains a denial of the material allegations of the complaint, and, as a separate defense, sets up title, acquired by adverse user, to all of the water of said creek. When the cause came on for trial, counsel for appellant demanded that the issue made as to damages be first tried by a jury, which demand the court denied, and proceeded to try the issues as to the respondent's right to a perpetual injunction, and as to the amount and priority of his water right, upon which issues the court made its findings of fact and conclusions of law, and entered judgment and decree in favor of the respondent, perpetually enjoining the appellant, and decreeing the priority of his water right to the extent of one hundred and forty miner's inches. The issue for damages was continued for the term, and a motion for a new trial denied. This appeal is from the judgment, and an order denying the motion for a new trial.

We shall, *in limine*, advert to the manner in which this case was tried. The complaint states but one cause of action, and the claim for damages is incidental to that. The court should have tried the equitable part of this action, and thereafter, if a jury was demanded to try the issue of damages, submitted that question to a jury. After verdict, the court ought to have made its findings of fact and conclusions of law, and entered judgment accordingly. Such actions as this must not be tried piecemeal, and several judgments entered; that is, the material issues must all be tried and found upon before judgment is entered, else one material issue might be tried, and judgment entered thereon, and the other issues postponed until a subsequent term of court, and then another issue or cause of action tried, and judgment entered thereon, and other causes of action, if any are pleaded, continued to a subsequent term, and so on to the end. This procedure would of necessity require repeated ap-

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peals in the same action, when, if all of the material issues were tried before judgment was entered, but one would be needed. Our practice acts do not contemplate that actions shall be tried in that way.

The admission in evidence of the judgment-roll in the case of Boyle et al. against McGarvey et al. is assigned as error. The appellant was not a party or privy to that suit, and it is elementary that a judgment can have no binding force upon one not a party or privy to the action in which such judgment is rendered. (2 Black on Judgments, sec. 600.) Counsel for respondent contend that said judgment-roll was introduced for the purpose of corroborating the evidence of respondent as to the date from whence his water right began, and was proper for that purpose. The date of the location and appropriation of said water was a fact to be proved by respondent, and he produced on the trial his grantor and predecessor in interest, who testified that he cultivated and irrigated twenty-five acres of respondent's said land in 1873, and increased the acreage in cultivation from year to year thereafter until 1894, when he sold said land to plaintiff. That witness could have testified as to the amount of water he used on said land, and appropriated for the use thereon, and that would be the best evidence of the date of such appropriation. The court erred in admitting said judgment-roll.

The fourth and fifth findings of fact are assigned as error, which findings are to the effect that plaintiff and his predecessors in interest appropriated one hundred and forty inches of the waters of Kirtley creek, and he is entitled to the continuous flow of said water, and has superior right thereto. We have not found sufficient evidence in the record to support said findings, and apparently the trial court based said findings on said judgment-roll. If plaintiff and his predecessors in interest located and appropriated one hundred and forty miner's inches of the water of said creek, and applied the same to a beneficial use upon his said land, he can show that fact by competent evidence. It cannot be shown by the judgment-roll in an action to which appellant was not a party or privy.

The refusal of the court to admit in evidence the deed from James L. Kirtley and wife to the Michigan Gold Mining

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Company is assigned as error. Said deed purports to convey certain placer mining ground, situated on Kirtley creek, extending about three miles along said creek, and all ditches, water rights etc., used in connection with, and appertaining to, said placer claims. The appellant in his answer avers a right to the prior use of all of the waters of said creek acquired by adverse user, but he nowhere avers that he acquired such right by prior location and appropriation, and we are unable to see wherein or how said deed can be relevant to any issue made by the pleadings. Appellant avers that he and his predecessors in interest have used all of the waters of said creek for the ten years last past, and bases his right on adverse user. Said deed bears date June 9, 1887—about twelve years prior to the filing of the answer. There was no error in excluding it.

The primary object of this action was to restrain appellant from filling respondent's ditch with placer mining debris, from running the same on his land, and for damages. Those are the only reliefs specifically prayed for. But since an answer has been filed, and respondent's prior and superior right to one hundred and forty inches of the water of said creek is alleged in the complaint, under the prayer for general relief, the court may settle that issue. Section 4353 of the Revised Statutes provides that, in a case where an answer is filed, the court may grant any relief consistent with the case made by the complaint, and embraced within the issue. However, in this case it is not essential to the recovery of the specific relief prayed for that respondent establish the allegations of his complaint as to his prior and superior right to any of the waters of said creek, as one may own a ditch, or a ditch and land, independent of a water right, and may protect them from injury. The judgment of the court below is reversed and the cause remanded for further proceedings in accordance with the views expressed in this opinion. Each party must pay one-half of the costs of this appeal.

Huston, C. J., concurs.

Quarles, J., did not sit at the hearing of this case, and took no part in the decision thereof.

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BANKS AND BANKING.

1. **INSOLVENT BANK—CREDITORS OF.**—The creditors of an insolvent bank are not entitled to share *pro rata* in public money deposited in such bank. (*State v. Thum*, 323.)
2. **PUBLIC MONEY—TRUST FUND, WHEN DEPOSITED IN BANK.—BELONGS TO TRUE OWNER.**—Public money deposited by a public officer in a bank becomes a trust fund, and not part of the estate of the bank, and, in case of the insolvency of the bank, its receiver must treat such fund as the property of the true owner, and not of the bank. (*State v. Thum*, 323.)
3. **CHECK—PRESUMPTIONS.**—The law presumes that the drawer of a check has funds in the hands of the drawee to satisfy the check. (*Fox v. Rogers*, 710.)
4. **ALLEGATIONS OF COMPLAINT—PRESENTMENT OF CHECKS.**—A complaint, seeking judgment upon certain checks, averred facts showing that the payee received the checks in a county adjoining the one in which the drawer was doing business, sixteen days before the drawer failed and became insolvent, but did not allege presentment or any fact excusing presentment, or any fact showing reasonable effort to present such checks. *Held*, on general demurrer that said complaint did not state a cause of action. (*Fox v. Rogers*, 710.)

BENEVOLENT CORPORATION.

See Corporations, 3.

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BILL OF REVIEW.

See Review, Bill of.

BILLS AND NOTES.

TRANSFEREE—ASSIGNOR.—Where a promissory note payable “to order” is transferred without indorsement, the transferee acquires only the equitable title and can only recover subject to the defenses that were available against his assignors. (*Warren v. Stoddart*, 692.)

See Banks and Banking, 3, 4.

BOARD OF ACCOUNTANTS.

See Counties, 2-4.

BOARD OF EQUALIZATION.

See Taxes--Board of Equalization.

BONDS.

See Counties, 8.

BONDS AND UNDERTAKINGS.

See Principal and Surety.

BUILDING AND LOAN ASSOCIATIONS.

1. **BUILDING AND LOAN ASSOCIATIONS.**—Where the borrower subscribes for shares in a loan association merely to obtain a loan, and is required to make monthly payments upon such shares, and by the terms of the contract the “maturity of the shares” extinguished the debt and cancels the stock, the borrower is a stockholder in fiction and not in fact, and the actual relation between the parties is only that of creditor and debtor. (*Fidelity Sav. Association v. Shea*, 405.)
2. **RELATION OF PARTIES.**—A contract of loan, in which the debtor agrees to pay monthly six dollars, which is applicable to the satisfaction of the principal debt, and seven dollars and fifteen cents interest monthly, upon the debt of \$650, until the entire debt is paid, is equivalent to an interest charge of twenty-six and two-fifths per cent per annum, upon the principal of the loan, average time, and is usurious. (*Fidelity Sav. Association v. Shea*, 405.)

See Usury, 4-10.

CANCELLATION.

See Deeds.

CAPITAL.

See State Capitol.

CERTIORARI.

1. **CERTIORARI—WHO MAY MAKE APPLICATION.**—Under the provisions of section 4963 of the Revised Statutes, the application for a writ of review must be made by the party beneficially interested. (*Madison v. Piper*, 137.)
2. **PETITION THE COMPLAINT—VERIFICATION.**—The petition for a writ of review is the complaint and must be made on affidavit. The verification may be made by the attorney for the petitioner if such attorney knows all of the facts set up in the petition, and so states in the affidavit. (*Madison v. Piper*, 137.)
3. **CERTIORARI—JURISDICTION.**—*Certiorari*, denominated writ of review by the Idaho code, will not lie to review the action of a city council in letting a contract to pave a street. (*Adleman v. Pierce*, 294.)
4. **CERTIORARI—MINISTERIAL ACT.**—*Certiorari* does not lie to review a ministerial act performed by a ministerial officer acting in a ministerial capacity. (*Murphy v. Board of Equalization*, 745.)

See Receivers, 2-5.

CHATTEL MORTGAGES.

1. **CHATTEL MORTGAGE—RECORDING—ACTUAL NOTICE.**—A junior mortgagee, who takes his mortgage with actual notice of the existence of another mortgage upon the same property, and with the understanding that the lien of his mortgage is subject to that of such former mortgage, is not entitled to precedence on the grounds that such former mortgage was not filed of record in the proper county recorder's office prior to the time that his mortgage was filed in such office. (*Wells, Fargo & Co. v. Alturas etc. Co.*, 506.)
2. **SAME—GOOD BETWEEN PARTIES—GOOD AGAINST JUNIOR MORTGAGEE WHO HAS ACTUAL NOTICE.**—A chattel mortgage upon a stock of merchandise, under the terms of which the mortgagor retains possession and sells in the usual course of trade, applying proceeds of sale less expenses thereof to the mortgage debt, is valid as between the parties and privies thereto, and as against junior mortgages of the same kind, taken with actual notice of such former mortgage. (*Wells, Fargo & Co. v. Alturas etc. Co.*, 506.)
3. **SAME—ESTOPPEL.**—A mortgagee who takes a mortgage upon a stock of merchandise, which mortgage authorizes the mortgagor to retain possession of the mortgaged chattels, and sell the same in the usual course of business, and who knows of a similar, prior existing mortgage upon the same chattels, and agrees that his

CHATTEL MORTGAGES (Continued).

mortgage lien shall be subject to the lien of such former mortgage, is estopped from questioning the validity of such former mortgage. (Wells, Fargo & Co. v. Alturas etc. Co., 506.)

See Mortgages, 8.

CHECKS.

See Banks and Banking, 3, 4.

CLERK OF COURT.**APPOINTMENT OF DEPUTY CLERK NOT A CREATION OF AN OFFICE.—**

When the record shows that upon application by the clerk of the district court, who is ex-officio county recorder and auditor the board of county commissioners, after hearing of evidence in support of such application, found and determined that a necessity for such appointment existed, and thereupon authorized and empowered said officer to appoint such deputy and fixed his salary, and where it further appears that the fees and commissions of said office exceeded the maximum salary of such officer and that of the deputy authorized by the board of commissioners, it is the duty of said board of commissioners to audit and allow the claim for such salary of the deputy, and upon their refusal to do so, an action against the county for the amount of said deputy's salary will lie. (Dunbar v. Canyon County, 725.)

CLOUDED TITLE.

CLOUD ON TITLE—CANCELLATION OF MORTGAGE.—Under the facts of this case equity will remove the cloud cast upon the mortgagor's title, it being shown that the mortgagor has paid to the mortgagee the principal sum borrowed and that such contracts were *ultra vires*. (Portneuf Lodge, I. O. O. F. v. Western Loan etc. Co., 673.)

COMMUNITY PROPERTY.

See Husband and Wife.

COMPLAINT.

See Pleading.

CONFESSIONS.

See Criminal Law, 7.

CONSTITUTIONAL LAW.

CONSTITUTIONAL LAW—DELEGATION OF POWER.—A power or function vested in one department body, board, or tribunal by express

CONSTITUTIONAL LAW (Continued).

constitutional provision, cannot be delegated by such department, body, board or tribunal to another department, body, board or tribunal. (*Reynolds v. Board of Commrs.*, 787.)

CONTAGIOUS DISEASE.

See Marriage.

CONTINUANCE.

CRIMINAL LAW—CONTINUANCE OVER TERM.—Where an application for a continuance of the trial over the term is based upon the absence of witnesses, and the state offers to admit that if present the witnesses would testify as set forth in the affidavit upon which the application for a continuance is based, it is not error in the trial court to refuse the continuance. *Territory v. Guthrie*, 2 Idaho, 398. (*State v. St. Clair*, 109.)

CONTRACTS.

1. **PUBLIC INTEREST—CONTRACT.**—B. entered into a contract with Y. for the purchase of the material and fixtures constituting the newspaper publishing plant of the "Silver Blade" newspaper, and as a part of the consideration agreed to obtain for Y. the contract to publish certain classification lists of mineral lands. And Y. on his part agreed to bid for the county printing of Kootenai county, and in case he was awarded said printing, he would assign the contract to B., provided B. complied with his part of said contract and purchased said newspaper plant. B. performed all the conditions of said contract agreed to be performed by him, and Y. thereupon refused to turn over said property to B., on the ground that said contract was contrary to public interest or policy, illegal and void. *Held*, under the facts of this case said contract was legal, valid and not in conflict with public interest. (*Brady v. Yost*, 273.)
2. **ILLEGAL CONTRACT.**—Any agreement respecting public contracts to be awarded on bids which tends to deprive the people of the advantage of competition in bidding is unlawful and void. (*Brady v. Yost*, 273.)
3. **CONTRACT—PAROL EVIDENCE CONTRADICTING RECEIPT.**—In a suit growing out of a contract of settlement which is not reduced to writing, the contract itself may be proven, although the evidence proving it contradicts recitals in a receipt connected with the transaction. (*Barghoorn v. Moore*, 531.)

CONVENTIONS.

See Elections.

CORONER'S INQUEST.

1. INQUEST—CORONER—PHYSICIAN.—When a physician or surgeon has been subpoenaed and ordered by a county coroner, under the provisions of section 8379 of the Revised Statutes, to inspect the body of a deceased person, and to give to the coroner's jury his professional opinion as to the cause of death, the reasonable value of his services in making the inspection is a charge against the county, under the provisions of section 2161 of the Revised Statutes, and acts amendatory thereof, defining what claims are charges against a county. (Fairchild v. Ada County, 340.)
2. SAME—AUTOPSY.—If, in such case, an autopsy is necessary to ascertain the cause of death, and such autopsy is made by a physician or surgeon under the provisions of said section 8379 of the Revised Statutes, he is entitled to recover from the county the reasonable value of his services in making such *post mortem* examination. (Fairchild v. Ada County, 340.)
3. SAME—WHAT COMPENSATION PHYSICIAN IS ENTITLED TO.—A physician or surgeon is not entitled to the compensation aforesaid on the ground that he is an expert witness, but for the work and labor necessary in the examination of the body, in order to prepare himself to give an intelligent opinion to the jury of the cause of the death of the deceased. (Fairchild v. Ada County, 340.)
4. LIABILITY OF COUNTY—AUTHORITY OF CORONER.—The coroner is not authorized to make a contract as to the sum the county shall pay in such cases. And the board of county commissioners should only allow the reasonable value of such services. (Fairchild v. Ada County, 340.)

CORPORATIONS.

1. TRANSFER OF STOCK—DURESS—BONA FIDE HOLDER.—The transfer of stock by a married woman, although procured by duress and coercion on the part of her husband, is good under the statutes of Idaho, where the transferee is a *bona fide* holder for value without notice or knowledge of such duress or coercion. (Bryan v. Montandon, 352.)
2. SHARES OF STOCK IN CORPORATION—ATTACHMENT—EXECUTION.—Shares of stock in a corporation can only be subjected to a debt by seizure under attachment or execution in the manner prescribed by the statutes relating to such seizure. (Wells v. Price, 490.)
- 2a. SAME—SHARES OF STOCK IN IRRIGATION CORPORATION NOT APPURTENANT TO LAND.—Shares of stock owned by the execution defendant in an irrigation corporation are not appurtenant to the lands owned by such execution defendant although he irrigates such lands with water from a canal owned by such corporation. (Wells v. Price, 490.)
- 2b. CORPORATION—DISSOLUTION—COPARTNERSHIP.—In an action by a stockholder for the dissolution of a corporation and a distribution of

CORPORATIONS (Continued).

its assets, the court, having found the existence of the corporation as such, the amount of the capital stock, and the amount of the same held by each stockholder, proceeded to distribute a part of the assets in specie among certain of the stockholders, without any finding as to the value of the same, and then decrees a sale of the balance of the property and a distribution of the proceeds of the sale upon the basis of a copartnership. *Held*, error, as not being in conformity with the provisions of section 4330 of the Revised Statutes. (*Clow v. Redman*, 568.)

3. CORPORATION—ENCUMBERING REAL ESTATE.—Under the provisions of section 2764 of the Revised Statutes a benevolent corporation cannot legally encumber or sell its real property without first obtaining an order for that purpose of the district court of the county in which such real property is situated. (*Portneuf Lodge v. O. O. F. v. Western Loan etc. Co.*, 673.)
4. CONTRACTS ULTRA VIRES.—The execution of those usurious or forbidden contracts was not germane or incidental to any powers conferred on said plaintiff corporation by its charter or the laws of this state, but was absolutely prohibited. (*Portneuf Lodge, I. O. O. F. v. Western Loan etc. Co.*, 673.)
5. DEFAULT JUDGMENT—SERVICE OF SUMMONS—JUDGMENT-ROLL.—On appeal from a default judgment against a foreign corporation who has not appeared in the action, the judgment-roll must contain evidence of the service of the summons upon that person designated by such corporation upon whom process is to be served under the provisions of section 2653, Revised Statutes, or else upon one of the agents or officers of such corporation mentioned in subdivision 2 of section 4144, Revised Statutes, and if such evidence of service of summons does not appear in the judgment-roll, the judgment will be reversed on appeal. (*Applington v. G. V. B. Min. Co.*, 216.)
6. FOREIGN CORPORATION—DESIGNATED AGENT—VENUE OF ACTIONS IN JUSTICE'S COURT.—By complying with the requirements of law as to the appointment of an agent upon whom process may be served, a foreign corporation doing business in Idaho requires the same rights, but no greater than those of a citizen, so far as the venue of actions against it are concerned. (*Webster v. Oregon Short Line Ry.*, 312.)
7. SAME—JURISDICTION.—Under the provisions of section 4639 of the Revised Statutes, a foreign corporation doing business in this state may be sued in a justice's court in the precinct in which an injury to property occurs, to recover damages for such injury, although such precinct may be in a county other than the one in which its principal place of business is, and its duly designated agent to receive process for it resides. (*Webster v. Oregon Short Line Ry.*, 312.)

See Receivers.

COSTS.

1. **COSTS—WHAT PREVAILING PARTY IS ENTITLED TO.**—Where an order to show cause why an injunction should not issue is apparently heard by consent or agreement of parties, without any attempt to comply with the provisions of the statute in relation thereto, the prevailing party is entitled to recover disbursements actually and necessarily made in preparing for such hearing, including the cost of procuring witnesses; and where, upon an appeal from an order made upon such hearing, an appeal is taken, the prevailing party being the appellant he is entitled to tax in his costs the amount paid by him to procure a copy of the evidence from the court stenographer, i. e., reporter. (*Raft River Land etc. Co. v. Langford*, 30.)
2. **TAXING COSTS—MEMORANDUM AS PROVIDED BY LAW A PRIMA FACIE CASE.**—On a motion to tax costs, a memorandum of costs verified and filed as provided by section 4912, and amendments thereto, makes a *prima facie* case for the party entitled to the costs, and in order to justify a taxation thereof by the judge the dissatisfied party must overcome by proof the *prima facie* case made by such memorandum. (*Elliott v. Collins*, 157.)
3. **FILING MEMORANDUM OF COSTS.**—A memorandum of costs in such a case is filed and served in time, if done within five days after the court has announced that it accepts and adopts the findings of the jury. (*Peters v. Leflang*, 364.)

COUNSEL.

See Attorneys.

COUNTERCLAIM.

See Setoff and Counterclaim.

COUNTIES.

1. **FIXING SALARIES OF COUNTY OFFICERS.**—Act of March 2, 1899, provides a uniform basis, reasonable compensation, throughout the state, for the fixing of salaries of county officers; is general in its operation; does not delegate legislative functions, does not contravene the constitution, and is a valid act. *Stookey v. Board of Commissioners*, ante, p. 542, 57 Pac. 312, affirmed. (*Reynolds v. Board of Commrs.*, 787.)
2. **BOARD OF ACCOUNTANTS—CLERICAL DUTIES.**—Accountants appointed under the provisions of an act creating a new county out of part of the territory of another county, to apportion the indebtedness of the old county between it and the new county, upon a given basis, are not vested with either legislative or judicial functions, but perform mere clerical duties. *Blaine County v. Smith*, 5 Idaho,

COUNTIES (Continued).

255, 48 Pac. 286, cited and approved. (Blaine County v. Lincoln County, 57.)

3. **SAME—ACTS OF BOARD NOT FINAL.**—The acts of a board of accountants appointed to apportion a debt between two counties upon a given basis, is not final, but may be impeached on the ground of fraud or mistake. (Blaine County v. Lincoln County, 57.)
4. **STATUTORY LIABILITY OF NEWLY CREATED COUNTY—JURISDICTION OF COURT TO IMPEACH REPORT OF ACCOUNTANTS.**—A board of accountants provided by statute to apportion a certain indebtedness between two counties, on a given basis, acted and, in acting, failed to carry out the direction of such statute, by which failure on their part one county was defrauded of a large sum of money, which should, under the provisions of such statute, be paid to it by the other county. *Held*, that in such case, the courts have jurisdiction to grant relief. *Held*, further, that it was the duty of such board to carry out the provisions of the statute under which it was created, and in case of failure by such board to perform its duties, the court must, in a proper action therefor, grant relief by rendering such judgment as will carry out the will of the legislature as expressed in said statute. (Blaine County v. Lincoln County, 57.)
5. **PLEADING.**—It is not necessary to allege specific acts of fraud or deception in the complaint in an action brought by a county to recover back money allowed a county officer as compensation in violation of law. (Fremont County v. Brandon, 482.)
6. **COUNTY COMMISSIONERS—VOID ORDER—COLLATERAL ATTACK.**—An order allowing a county officer compensation to which he is not entitled by law, made by a board of county commissioners, is void for want of jurisdiction, and may be attacked collaterally. (Fremont County v. Brandon, 482.)
7. **COUNTIES—RECOGNITION OF—ESTOPPEL.**—The state, having, through each of its co-ordinate branches of government, repeatedly recognized Blaine county as a county and legal subdivision of the state, is estopped, after the lapse of nearly four years, from questioning the regularity of the passage of the act creating the county. (People ex rel. Attorney General v. Alturas Co., 418.)
- 7a. **SAME.**—Act creating county will not be inquired into after recognition for four years. The legislature, by an act approved March 5, 1895, established the county of Blaine; the legislature thereafter, in four different acts, recognized the existence of Blaine county as a legal subdivision of the state; the supreme court of the state held the acts creating Blaine county to be valid; its existence was repeatedly recognized by the executive department; the people residing within the territory embraced within Blaine county repeatedly recognized the existence of the county; *held*, general elections

COUNTIES (Continued).

therein, participated in by the electors, generally elected county and precinct officers, levied and collected taxes, assumed debts of its predecessors, funded a large indebtedness, brought suits as a county against other counties, and recovered large sums, and exercised all the powers and functions of a county government for a period of nearly four years. *Held*, that under such circumstances, the court would decline to examine into the manner of the passage of the act creating the county. (*People ex rel. Attorney General v. Alturas Co.*, 418.)

8. **FINDING WARRANT INDEBTEDNESS—VALIDITY OF BONDS—CONSTITUTIONAL LAW—VALIDATING ACT.**—A board of county commissioners proceeded under the provisions of the act of March 8, 1895, to fund outstanding warrant indebtedness of the county, submitting the question to the electors at an election called for the purpose, at which election more than two-thirds of the electors voted in favor of issuing the proposed bonds; after due notice, bids were received, and one bid for the entire issue was accepted, the bonds duly engraved and signed ready for delivery when an agreed case was submitted to the district court for the purpose of determining the validity of the proposed bonds, the principal contention being that said act of March 8, 1895, was void; 1. Because not constitutionally passed; 2. Because the subject thereof was not expressed in the title. *Held*, that the legislature having reenacted the act of March 8, 1895, and passed an act validating all bonds theretofore issued under said act, that the court will not inquire into or determine the validity of said act as originally passed, as such question is immaterial to the validity of the proposed bonds. (*Crocheron v. Shea*, 593.)
9. **APPEALS FROM ACTION OF COMMISSIONERS.**—The action of the board of commissioners in fixing salaries of county officers, under act of March 7, 1899, is not final, but subject to appeal. (*Reynolds v. Board of Commrs.*, 787.)
- 9a. **SAME—FINDINGS OF FACT.**—Upon trial of appeal from order of a board of county commissioners, findings of fact should be made, unless waived as provided in section 4405 of the Revised Statutes. (*Reynolds v. Board of Commrs.*, 787.)
10. **JUDICIAL DISCRETION.**—When a board of county commissioners, in exercising a discretionary power, make an order, such order will not be disturbed on appeal, except in case of clear abuse of such discretion. (*Reynolds v. Board of Commrs.*, 787.)

See Attorneys, 1; Constitutional Law, 2; Limitation of Actions, 1.

COURTS.

JURISDICTION—TRANSFER OF CAUSE TO UNITED STATES CIRCUIT COURT — CIRCUIT COURT REMANDS TO STATE COURT—EQUITABLE ESTOPPEL TO QUESTION JURISDICTION.—The circuit court of the United

COURTS (Continued).

States, to which a cause has been transferred or removed from a state court, is the sole judge as to whether the cause was properly removed or not, and its order remanding the case back to the state court is binding upon the parties, and should be respected by the state courts. After the lapse of more than six years from the making of an order by the United States circuit court, to which a cause had been removed from a state court, remanding said cause back to the state court, and after an appeal from said judgment by the defendant on a record absolutely silent as to any question of jurisdiction on the part of the state courts, the said judgment was affirmed by the state supreme court, after which said defendant filed a petition for a writ of review, on the ground that the state courts had no jurisdiction. *Held*, that the petitioner is estopped from questioning the jurisdiction of the state courts, and the writ demanded should be denied. (*Coeur d'Alene Ry. etc. Co. v. Spalding*, 97.)

See Clerk of Court; Justice of Peace.

COVENANTS.

1. **SAME—REMEDY.**—In cases of this kind the vendee may pay off the encumbrance and recoup the sum so paid against the amount due on the purchase price, but that is not his only remedy, as a defense on the ground of breach of covenant of encumbrance is sufficient to defeat an action for the recovery of the purchase price until such encumbrance be removed. (*Warren v. Stoddart*, 692.)
2. **COVENANTS IN DEED.**—The word "grant" when used in a conveyance by which an estate of inheritance is to be passed, is a covenant that the estate so conveyed is at the time of the execution thereof, free from encumbrances done, made or suffered by the grantor or any person claiming under him. (*Warren v. Stoddart*, 692.)
3. **BREACH OF COVENANTS AGAINST ENCUMBRANCE.**—There is a clear distinction between breaches of covenants of "warranty" and "quiet and peaceable enjoyment" and breaches of covenants against encumbrances. (*Warren v. Stoddart*, 692.)

CRIMINAL LAW.

1. **WRIT OF MANDATE—CUSTODY OF PRISONER.—CRIMINAL LAW—EX POST FACTO LAW—CHANGING PLACE OF EXECUTION—JUDGMENT.**—The provision of section 159 of the Revised Statutes of 1887 is intended as and is a general saving clause to penal statutes, amendatory and otherwise, and continues in force a statute as it existed as to all offenses committed prior to repeal, and a person convicted of an offense and sentenced to death prior to repeal must be punished under the law as it existed at the time of the commission of the offense. Act of February 18, 1899 (Session Laws 1899, p. 340), amending certain sections of the Revised

CRIMINAL LAW (Continued).

Statutes of 1887, regulating the time, place and manner of inflicting the death penalty, construed with section 159 of the Revised Statutes, is not applicable to past offenses and is prospective only in its operation. (In re Davis, 706.)

2. **ALIBI—BURDEN OF ESTABLISHING.**—Where a defendant relies upon the defense of an *alibi*, the burden of establishing such defense is upon the defendant, and if the defendant succeeds, by competent evidence, in establishing a reasonable doubt in the minds of the jury as to his presence at the time and place when and where the offense was committed, when the committing of the offense by him made his presence imperative, he is entitled to an acquittal. The character and extent of the evidence requisite to create such doubt is matter for the jury. (State v. Webb, 428.)
3. **ALIBI—WHAT MUST BE SHOWN.**—The gist of the defense of *alibi* consists in showing that at the time of the commission of the alleged crime the defendant was at a place different from that where the crime was committed. (State v. Davis, 159.)
4. **SAME—COMPETENT TO SHOW ACCUSED FLED THE STATE.**—It is competent, on a murder trial, to show that immediately after the commission of the crime the defendant fled the state and was afterward arrested in another state, where he was going under an assumed name. (State v. Davis, 159.)
5. **SAME—OTHER CRIME—THREATS AGAINST A CLASS.**—When the accused was making war against a class of men (shepherders) and threatening to keep them off a certain range by use of deadly weapons, and had made threats against shepherders generally, and against the person of the deceased, who was a shepherd, it was competent for the state to prove that two days before the homicide the defendant had attacked, with such weapons, the camp of other shepherders, as such evidence tended to show the state of mind of the defendant toward the deceased, and to establish motive on his part to commit the crime. (State v. Davis, 159.)
6. **EVIDENCE—COMPETENT TO SHOW MOTIVE.**—The defendant was a cattle man, the deceased a sheepman. The state was permitted, over the objections of the defendant, to prove that the accused was making war against sheepmen generally, and threatening the lives of all sheepmen who failed to keep off a certain range; the deceased, a sheepman, was killed on such range; and the circumstances pointed to the accused as the guilty party. *Held*, that the evidence objected to was competent, as it tended to show motive on the part of the defendant. (State v. Davis, 159.)
7. **CONFESSION BY AN ACCUSED.**—A confession, or declaration tending to show guilt made by an accused while under arrest, of his own volition, and without any threat or promise or inducement having been made or held out to him by such officer or other person present, is competent evidence on the trial of a criminal case. (State v. Davis, 159.)

CRIMINAL LAW (Continued).

- 8. CRIMINAL PRACTICE—EVIDENCE—DEPOSITIONS ON PRELIMINARY EXAMINATIONS.**—The admission as evidence, upon the trial of a person charged with a criminal offense, of the depositions of witnesses taken on the preliminary examination of such person upon such charge is not permissible under the statutes of Idaho. The Penal Code having prescribed the cases in which depositions taken on preliminary examinations may be used, the court is not authorized to extend the rule to cases other than so prescribed by statute. (*State v. Potter*, 584.)
- 9. CRIMINAL LAW—SECTION 8500 OF THE REVISED STATUTES NOT REPEALED.**—The provisions of section 8500 of the Revised Statutes, providing for the sentence of persons convicted of crimes punishable by imprisonment in the state penitentiary has not been repealed or modified by subsequent legislation. (*In re Corcoran*, 657.)

See Continuance; Gambling.

DAMAGES.

DAMAGES—DISFIGUREMENT AN ELEMENT OF.—Disfigurement caused by a tortious injury is an element of general damage, but annoyance caused by contemplation of such disfigurement is too remote to be considered as an element of damage. (*Giffen v. City of Lewiston*, 231.)

See Appeal and Error, 1; Husband and Wife, 4-5; Injunctions; Municipal Corporations.

DEEDS.

DEED TO MINING PROPERTY—CONSIDERATION—CANCELLATION OF DEED.—Where S. executed and delivered to E. a deed of a one-fourth interest in certain mining property for the consideration of E. paying certain indebtedness contracted by E. and S. in working of such property as copartners, and also a certain note and mortgage executed by S. and the release of S. from any and all liability upon such indebtedness, and it was understood and agreed by and between said parties that said deed was not to become operative or to pass title until such payment had been made by E., *held*, that on the refusal of E. to make said payments or comply with said conditions, S. was entitled to have such deed canceled. (*Steffy v. Esler*, 228.)

See Acknowledgments; Covenants.

DEMURRER.

See Pleading.

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DEPOSITIONS.

See Criminal Law, 8.

DESCENT AND DISTRIBUTION.

1. ESTATE OF DECEDENT—NONRESIDENT FOREIGNERS.—A nonresident foreigner cannot take real estate by succession under the provisions of section 5715 of the Revised Statutes, unless he appears and claims succession within five years after the death of decedent. (State v. Stevenson, 367.)
2. RIGHT OF SUCCESSION.—If succession is not claimed within said period of time, real estate owned by deceased escheats to the state to be disposed of as provided by section 5716 of the Revised Statutes. (State v. Stevenson, 367.)

DISMISSAL OF ACTION.

1. PRACTICE—DISMISSAL OF ACTION.—Under subdivision 1 of section 435, Revised Statutes, the plaintiff may dismiss at any time before a counterclaim has been made or affirmative relief sought by cross-complaint or answer of defendant. (Elliott v. Collins, 266.)
2. EFFECT OF OMISSION TO ENTER JUDGMENT OF DISMISSAL.—The omission to enter a judgment of dismissal did not defeat the plaintiff's dismissal of said action, nor did such dismissal remain in abeyance until the entry of judgment. (Boyd v. Steele, 625.)
3. ENTRY OF JUDGMENT.—If the provisions of said section requires a formal entry of judgment, it is one of the cases in which the law presumes that to have been done which ought to have been done. (Boyd v. Steele, 625.)
4. SAME—DUTY OF CLERK.—The clerk could not defeat a dismissal by neglecting or refusing to enter a formal judgment of dismissal. (Boyd v. Steele, 625.)
5. PROHIBITION—DISMISSAL—RIGHT OF PLAINTIFF TO DIRECT ENTRY IN REGISTER OF ACTIONS.—Under the provisions of section 4354 of the Revised Statutes, which provides that an action may be dismissed by the plaintiff at any time before trial, upon payment of costs, provided a counterclaim has not been made or affirmative relief sought by the defendant, the plaintiff in such a case is entitled to a dismissal upon payment of costs and filing his dismissal with the clerk. (Boyd v. Steele, 625.)

DITCHES.

See Municipal Corporations, 10-12.

DIVORCE.

1. **DIVORCE—SERVICE BY PUBLICATION.**—All of the requirements of the statute authorizing service of summons by publication must be complied with to give the court jurisdiction. (*Strode v. Strode*, 67.)
2. **SAME—WHAT NECESSARY TO GIVE JURISDICTION.**—When the record fails to show that a copy of the summons was sent to the address of the defendant, when the order directs that to be done, service of the publication is not complete, and does not give the court jurisdiction. (*Strode v. Strode*, 67.)
3. **SAME—PROOF OF SERVICE.**—Unless affidavits are filed showing that all of the requirements of the statute authorizing service by publication have been complied with, the court has no jurisdiction to enter judgment and decree. (*Strode v. Strode*, 67.)
4. **DIVORCE—PLEADINGS—DECREE.**—Where, in an action for divorce, the cross-complaint of defendant fails to set up a ground of divorce a decree in favor of defendant upon such cross-complaint will be set aside. (*Stover v. Stover*, 493.)

ELECTION OF REMEDIES.

ELECTION OF REMEDIES.—In order to apply the doctrine of election of remedies the party must actually have at his command inconsistent remedies. (*Elliott v. Collins*, 266.)

ELECTIONS.

1. **RIVAL CONVENTIONS—SAME PARTY—OFFICIAL BALLOT—WHO ENTITLED TO.**—Where a contention between two conventions arises of the same party as to which is entitled to have the ticket nominated by it placed upon the official ballot under the recognized party name, *held*, that the convention called by the regular state central committee of the party is entitled to have the ticket nominated by it placed upon the official ballot under the party name or designation. (*Williams v. Lewis*, 184.)
2. **OFFICIAL BALLOT.—ONLY ONE TICKET OF SAME PARTY.**—Under the statutes of Idaho only one ticket under the recognized name or designation of a political party is entitled to be placed upon the official ballot. (*Williams v. Lewis*, 184.)

EQUITY JURISDICTION.

See Jury, 1, 2.

ESCHEAT.

ESCHEAT.—Title by escheat passes to the state by operation of law. (*State v. Stevenson*, 367.)

ESTATE OF DECEDENT.

See Descent and Distribution; Executors and Administrators.

EVIDENCE.

EVIDENCE INSUFFICIENT TO SUPPORT THE JUDGMENT.—Evidence in this case examined and held not to support judgment. *Kelly v. Oregon Short Line etc. R. R. Co.*, 4 Idaho, 190, 38 Pac. 404, distinguished. (*Jones v. Oregon Short Line Ry.*, 441.)

See Appeal and Error, 7-9; Criminal Law; Trial; Witnesses.

EXCEPTIONS, BILL OF.

1. **WHAT BILL OF EXCEPTIONS MUST CONTAIN.**—Under the provisions of section 4427 of the Revised Statutes an order striking out a portion of a pleading is deemed excepted to and when such order, and the papers upon which it is made, are a part of the records and files in the action; it need not be embodied in a bill of exceptions, but may be reviewed on appeal as though settled in a bill of exceptions.—(*Warren v. Stoddard*, 692.)
2. **BILLS OF EXCEPTIONS—SPECIFICATIONS OF ERROR.**—Under the provisions of sections 4426, 4428 and 4430 of the Revised Statutes, a bill of exceptions is not required to contain a specification of the errors relied on, unless the exception is to the verdict or decision upon the ground of the insufficiency of the evidence to sustain it. In that case, the bill of exceptions must specify the particulars in which the evidence is not sufficient. (*Warren v. Stoddard*, 692.)
3. **BILL OF EXCEPTIONS—SECTION 4427 OF THE REVISED STATUTES CONSTRUED.**—Under the provisions of section 4427 of the Revised Statutes, 1887, an order overruling or sustaining a demurrer need not be embodied in a bill of exceptions to be reviewed on appeal. If the same appears in the records or files, it may be reviewed on appeal, as though settled in a bill of exceptions. (*Palmer v. Pettingill*, 346.)
4. **BILL OF EXCEPTIONS.**—A bill of exceptions must state the evidence which was admitted by the court over the objections of the party excepting to the introduction of such evidence, with the grounds upon which the objection is made, or else such exception will not be considered by the court. (*Naylor v. Vermont Loan etc. Co.*, 251.)

EXECUTIONS.

1. **PROBATE COURT—EXECUTION—SERVICE BY CONSTABLE.**—In certain cases a constable may execute and return an execution issued out of a probate court and may justify under it, if it is valid on its face. Under the provisions of section 3021 of the Revised Stat-

EXECUTIONS (Continued).

utes, the transfer of the personal property described in the complaint was void as against the creditors of the seller thereof. Under the facts of the case no demand was necessary before beginning this action. (*Coombs v. Collins*, 536.)

2. **PROCEEDINGS SUPPLEMENTARY TO EXECUTION—JURISDICTION OF JUDGE AT CHAMBERS—RECEIVERS.**—A judgment creditor, in proceedings supplementary to execution, brought in a third party, a stranger to the judgment, claiming that such third party held or claimed property belonging to the judgment debtor; the third party appeared and claimed the property adversely to the judgment debtor; a hearing was had before the trial judge, at chambers, who held the property subject to the judgment, and appointed a receiver to take charge of the property and subject it to the satisfaction of the judgment. On appeal, *held*, that the original order appealed from is void for the reason the trial judge exceeded his jurisdiction in making said order, his jurisdiction being limited to making orders provided in section 4510 of the Revised Statutes of Idaho. (*Spaulding v. Coeur d'Alene Ry. etc. Co.*, 638.)

See Corporations, 2, 3.

EXECUTORS AND ADMINISTRATORS.

1. **SALE OF REAL ESTATE BY ADMINISTRATOR.**—Under the provisions of section 5491 of the Revised Statutes, all sales made by an administrator of the estate of a deceased person must be reported under oath to, and confirmed by, the probate court before the title of the property sold passes. (*State ex rel. Chemung Min. Co. v. Cunningham*, 113.)
2. **SAME—RETURN OF SALE—CONFIRMATION BY THE COURT.**—No title passes until return of sale is made under oath and confirmed by the court, nor can the administrator legally convey the title until such report and confirmation are made. (*State ex rel. Chemung Min. Co. v. Cunningham*, 113.)
3. **ADMINISTRATOR MUST EXECUTE CONVEYANCE—MANDAMUS WILL LIE TO COMPEL.**—It is the official duty of an administrator, enjoined by statute, to execute a conveyance of real estate after return of sale has been made, as required by law, and confirmed by the court, and to execute a conveyance therefor as directed by the order of confirmation. In cases of refusal, *mandamus* will issue to compel him to act. (*State ex rel. Chemung Min. Co. v. Cunningham*, 113.)
4. **MANDAMUS—ORDER TO SELL REAL ESTATE—APPEALABLE ORDER.**—Under the provisions of subdivision 5, section 4831, of the Revised Statutes, an order denying the issuance of an order to show cause why the real estate of a decedent should not be sold to pay claims against his estate is an appealable order. A plain,

EXECUTORS AND ADMINISTRATORS (Continued).

speedy and adequate remedy by appeal having been thus provided, a writ of mandate will not issue to compel the issuance of such order. (State ex rel. Missoula Mercantile Co. v. Whelan, 78.)

See Descent and Distribution.

FEDERAL COURTS.

See Courts.

FEES AND SALARIES.

See Counties; Officers, 4; Sheriffs; Tax Assessors and Collectors.

FENCES.

See Railroads.

FINDINGS.

See Trial.

FOREIGN CORPORATIONS.

See Corporations, 5-7.

FRAUD.

FRAUD.—The evidence in this case examined and held not to establish fraud. (Felland v. Vollmer Milling etc. Co., 120.)

FRAUDS, STATUTE OF.

VERBAL CONTRACT—ADMISSIBILITY IN EVIDENCE.—Under the statutes of Idaho, a verbal contract for the sale or transfer of real estate is not admissible in evidence against a stranger to such contract. (McGinness v. Stanfield, 372.)

See Contracts, 3; Trusts, 2, 3.

GAMBLING.

ACT TO PROHIBITING GAMBLING CONSTRUED.—The act of February 6, 1899, known as the anti-gambling act, held valid. When the defendant in a criminal action attacks certain sections of an act as violative of the constitution, and it does not appear from the record that any of his rights affected by said sections were involved on the trial, or by the judgment, there remaining (should

the sections so attacked be eliminated) sufficient to constitute a valid act that supports the judgment, the court will not pass on the validity of the sections so attacked. (*State v. Mulkey*, 617.)

GRAND JURY.

1. **RESUBMISSION OF CRIMINAL CHARGE TO GRAND JURY.**—To authorize the resubmission of a charge which has been ignored by one grand jury to another grand jury to be thereafter impaneled, good cause for so doing must be shown. (*In re Moragne*, 82.)
2. In this case the objections raised to the legality of the grand jury examined and held to be untenable. (*In re Corcoran*, 657.)

GRANT OF POWER.

GRANT OF POWER—AUTHORITY.—A grant of power carries with it authority to do those things necessary to the exercise of the power granted. (*Wilson v. Hoise City*, 391.)

HABEAS CORPUS.

1. **HABEAS CORPUS—HOLDING PARTY TO BAIL AFTER CHARGE IS IGNORED BY GRAND JURY.**—It is error to hold a party to bail to answer a charge of felony after the charge has been fully and fairly investigated by a grand jury which ignored the charge, in the absence of a showing of improper conduct on the part of the grand jury, and it is not made to appear that other evidence than that considered by the first grand jury, which tends to prove the guilt of the accused, can, with reasonable diligence, be presented to another grand jury to be impaneled at the next term of the district court. (*In re Moragne*, 82.)
2. **HABEAS CORPUS—INFORMATION—JURISDICTION.**—When the petitioner is imprisoned on a bench warrant issued upon an information irregular upon its face, but which charges a public offense within the jurisdiction of the trial court, the writ of *habeas corpus* does not lie, as such writ cannot be substituted for a writ of error. (*In re Marshall*, 516.)
3. **HABEAS CORPUS—GRAND JURY.**—In an application for a writ of *habeas corpus*, the matter of the drawing, summoning and impaneling of the grand jury, which found indictment under which the petitioner was convicted, are not proper matters for consideration, such questions being subject to review only on appeal or writ of error. (*In re Corcoran*, 657.)
4. **HABEAS CORPUS—INSURRECTION.**—In case of insurrection or rebellion, the governor, or military officer in command, for the purpose of suppressing the same, may suspend the writ of *habeas corpus*, or disregard such writ, if issued. (*In re Boyle*, 609.)
5. **SAME—PROCLAMATION OF GOVERNOR.**—The truth of recitals of alleged facts in a proclamation issued by the governor proclaiming a certain county of the state to be in a state of insurrection and rebel-

HABEAS CORPUS (Continued).

lion will not be inquired into or reviewed on application for a writ of *habeas corpus*. (In re Boyle, 609.)

HEIRS.

See Descent and Distribution.

HOMESTEAD.

1. **HOMESTEAD—STATUTE MUST BE STRICTLY COMPLIED WITH TO CREATE.**—To entitle one to the benefit of a homestead the provisions of the statute as to filing and declaration of homestead must be strictly complied with. (Burbank v. Kirby, 210.)
2. **SAME—DECLARATION—ACKNOWLEDGMENT.**—When K., a married woman, filed a declaration of homestead upon community property, which declaration was not acknowledged and certified as required by statute, such filing did not constitute the property filed on a homestead, and it is too late after judgment sale and sheriff's deed thereunder to ask for the reformation of such acknowledgment in an action by the grantor in the sheriff's deed to recover possession of the property. (Burbank v. Kirby, 210.)
3. **HOMESTEAD—RESIDENCE—OCCUPANCY BY FAMILY AS A HOME.**—The fact that the homestead is occupied in whole or in part as a hotel does not deprive it of any of the benefits or immunities prescribed by the statutes, so long as it is used and occupied by the owner as a home and residence of himself and family, and is within the limitations of the statute as to value. Occupancy as a residence, and value, are the only limitations placed upon the homestead by the statute of Idaho. (Kiesel v. Clemens, 444.)

HOMICIDE.

See Criminal Law.

HUSBAND AND WIFE.

1. **MARRIED WOMAN—COMMUNITY DEBT—CREATED FOR WIFE'S SEPARATE BENEFIT.**—A married woman cannot bind herself personally for the debt of her husband, or for a community debt, and it is error to render judgment jointly against the husband and wife on a note signed by both in the absence of a showing that the debt was created for the separate use and benefit of the wife, or for the use and benefit of her separate estate. (Jaeckel v. Pease, 131.)
2. **DISPOSITION OF COMMUNITY PROPERTY.**—Under the provisions of section 2505, the husband has the management and control of the community property, with like absolute power of disposition (other than testamentary), as he has of his separate property,

HUSBAND AND WIFE (Continued),

- but such power of disposition does not extend to the homestead or to that part of the common property occupied or used by the husband and wife as a residence. (*Wilson v. Wilson*, 597.)
3. **SAME—SIGNATURE OF WIFE.**—The wife's signature is not necessary to an instrument by which the husband conveys or encumbers that part of the community property of which he has absolute power of disposition. (*Wilson v. Wilson*, 597.)
 4. **MEASURE OF DAMAGES—COMMUNITY PROPERTY.**—Loss of ability to labor is an element of general damage to be considered by the jury in an action brought by husband and wife to recover for a tortious injury to the wife, the amount so recovered being, under the laws of Idaho, community property of both husband and wife. (*Giffen v. City of Lewiston*, 231.)
 5. **VERDICT—TO WHOM TO RUN.**—In an action by husband and wife to recover damages for injuries received by the wife, the verdict and judgment should run to both husband and wife. (*Giffen v. City of Lewiston*, 231.)

INDIANS.

1. **JURISDICTION—INDIANS RECEIVING ALLOTMENTS OF LAND IN SEVERALTY ARE CITIZENS.**—Under the provisions of section 6 of the act of Congress, February 8, 1897, providing for the allotment of lands to Indians, Indians of the Nez Perces tribe who have received and accepted allotments of land, and patents therefor, under the provisions of said act, are entitled to institute or defend actions in the state courts. (*Wa-la-note-tke-tynin v. Carter*, 85.)
2. **TRESPASS UPON LANDS OF INDIANS BY ALLOTMENT.**—Indians holding lands by allotment are entitled to bring suit for trespass upon such lands. (*Carter v. Wann*, 556.)

INDICTMENT AND INFORMATION.

1. **INFORMATION—DESCRIBES DECEASED AS JOHN DOE.**—Where the information for murder described the deceased as one John Doe, whose true name was unknown to the district attorney who filed the indictment, and on the trial it was proven that the name of the deceased was John L. Decker, there was no material variance. Idaho Rev. Stats., sec. 7683. (*State v. St. Clair*, 109.)
2. **INDICTMENT.**—Objections to indictment considered and overruled. (*State v. Webb*, 428.)

See Grand Jury.

INFORMATION.

See Indictment and Information.

INJUNCTIONS.

1. **PRACTICE—INJUNCTION—DAMAGES.**—In a case when a perpetual injunction is prayed for, and also damages, the court must try the issue raised as to the injunction, and, on demand of either party, submit the question of damages to a jury and thereafter enter the proper judgment. (*Stocker v. Kirtley*, 795.)
2. **SAME—CAUSES CANNOT BE TRIED PIECEMEAL.**—It is error to try the issue as to the injunction, enter judgment thereon, and continue the question of damages to a subsequent term of the court. Causes cannot thus be tried piecemeal. (*Stocker v. Kirtley*, 795.)

See Costs, 1.

INQUEST.

See Coroner's Inquest.

INSANE PERSONS.

WHEN QUESTIONS WILL NOT BE CONSIDERED.—Where the record shows no evidence in the court below upon the question of the insanity of the defendant, this court will not entertain or consider that question. (*State v. St. Clair*, 109.)

INSOLVENCY.

1. **INSOLVENCY—JURISDICTION.**—An insolvent against whom an order is made is the party beneficially interested in this case, and may make application for a writ of review, for the purpose of reviewing an order which the judge had no jurisdiction to make. (*Madison v. Piper*, 137.)
2. **INSOLVENT DEBTOR—CANNOT BE REQUIRED TO ACCOUNT FOR UNPRESENTED CLAIM.**—A creditor of an insolvent debtor, whose claim was secured by mortgage, and had not been presented, proved and allowed in the insolvency proceeding, made application to have the debtor examined, on oath, in relation to a part of the property included in said mortgage. Thereupon a citation was issued and the debtor was examined, and the judge found that the debtor had disposed of a part of said property, and ordered the debtor to account to the mortgagee for the same. *Held*, that the judge had no jurisdiction to make such order. (*Madison v. Piper*, 137.)
3. **COLLATERAL SECURITY.**—Promissory notes held as collateral security, duly assigned to a nonresident, before maturity and for a valid consideration, are not barred by the discharge in insolvency of the maker of such notes, if the holder thereof has not voluntarily submitted himself to the jurisdiction of the laws of the state where such discharge was granted. (*Security Sav. etc. Co. v. Rogers*, 526.)

INSOLVENCY (Continued).

4. **INSOLVENCY LAW—JURISDICTION.**—The insolvency laws of Idaho have no extra territorial operation, and the promissory notes of a resident owned by a nonresident are not barred by the discharge of such resident in an insolvency proceeding, unless such nonresident voluntarily becomes a party to such proceedings, and thus submits himself to the jurisdiction of the laws of the state where such insolvency proceedings are had. (*Security Sav. etc. Co. v. Rogers*, 526.)

INSTRUCTIONS.

1. **INSTRUCTIONS.**—Contradictory instructions upon a material issue held to be ground for reversal. (*Giffen v. City of Lewiston*, 231.)
2. **INSTRUCTIONS.**—Where instructions are conflicting and irreconcilable they are erroneous. (*State v. Webb*, 428.)

INSURANCE.

INSURANCE PREMIUMS.—Insurance premiums voluntarily paid by the mortgagee, who insures the mortgaged property, cannot be recovered by him in the absence of a provision in the mortgage authorizing him to insure the mortgaged property at the expense of the mortgagor. (*Miller v. Hunt*, 523.)

INSURRECTION.

See Martial Law.

INTEREST.

See Building and Loan Associations, 2; Usury.

IRRIGATION.

See Corporations, 2a; Waters and Watercourses.

JUDGMENTS.

1. **PRESUMPTIONS AS TO REGULARITY.**—Every presumption and intendment of law is in favor of the regularity of a judgment of a court of general jurisdiction, and to overcome such presumption, in a suit brought to have such judgment declared void, facts must be alleged and proven showing wherein the court failed to obtain jurisdiction to render the judgment which is so attacked. (*Ollis v. Orr*, 474.)
2. **DECREE OF COURT OF SISTER STATE.**—A decree of a court of equity which has jurisdiction of the parties is binding on them, and if such decree affects the title to real property in another state such decree will be given force in that state. (*Idaho Gold Min. Co. v. Winchell*, 729.)

JUDGMENTS (Continued).

3. **JUDGMENT ON PLEADINGS.**—Judgment on the pleadings cannot be entered so long as there remains material issues of fact raised by the pleadings undetermined. (*Alsbaugh v. Reid*, 233.)
4. **JUDGMENT—CONCLUSIVE OF ALL QUESTIONS INVOLVED.**—The judgment of a court of competent jurisdiction, so long as the same is unreversed, is conclusive of all questions involved in the issues, presented by the pleadings and passed upon by the judgment of such court as to parties and privies. (*Elliott v. Porter*, 684.)
5. **EVIDENCE.**—All who are neither parties to a judgment nor the privies to such parties are not bound by such judgment. (*Stocker v. Kirtley*, 795.)
6. **ESTOPPEL—FORMER ADJUDICATION.**—Parties to a judgment, which has been reversed or set aside or annulled in a proper proceeding are precluded from again litigating the same cause of action determined by such judgment. *K.*, a junior mortgagee, sued his mortgagor and the senior mortgagee to have his mortgage lien adjudged prior to that of the senior mortgagee, alleging specific acts of fraud on the part of the senior mortgagee, by which he was induced to accept his junior mortgage; the cause was determined adverse to *K.* and in favor of the senior mortgagee; afterward *K.* commenced an action to have a deed, which he had executed to the senior mortgagee, and which was in fact the consideration for *K.*'s mortgage, annulled on the ground of fraud in the procurement thereof, alleging the same facts alleged in the former suit. *Held*, that he was estopped by the former adjudication. (*King v. Co-operative etc. Assn.*, 760.)
7. **PLEADINGS—JUDGMENT.**—A complaint which attacks a judgment as void solely upon the ground that the affidavit on which order for publication of summons was made "was insufficient" does not state facts sufficient to constitute a cause of action to have such judgment adjudged void, and such complaint, when unaided by affirmative allegation in the answer will not support a judgment for the plaintiff. (*Ollis v. Orr*, 474.)
8. **JUDGMENT—ASSIGNMENT AND SATISFACTION OF—JURISDICTION.**—plaintiff sued to foreclose a mortgage, and defendant obtained judgment for costs, which judgment defendant assigned to her attorney. By request of attorney for plaintiff, said assignee sent a receipt to a bank in another state with instructions to receive the money for him and deliver the receipt; the plaintiff paid the money to the said bank, took up the receipt and filed it in the action. Plaintiff sued said assignee in said other state to recover a debt alleged to be due it from the said assignee, and garnished the money in the hands of the bank. The assignee moved to strike the receipt from the files and that execution issue on the judgment, and the court so ordered. *Held*, that said order was erroneous; that payment to the bank (agent of the assignee) satisfied the judgment; and that the forum of

JUDGMENTS (Continued).

the state where the garnishment was had is the proper tribunal to decide the questions between the plaintiff and said assignee. (Vermont Loan etc. Co. v. McGregor, 134.)

9. **SETTING ASIDE DEFAULT—WHAT MUST BE SHOWN—DISCRETION OF TRIAL COURT.**—The discretion of the trial court in refusing to set aside a default judgment will not be disturbed unless it is shown that such discretion has been abused. An application by the defendant to set aside a default judgment after the term at which such judgment was rendered must be supported by evidence showing mistake, inadvertence, surprise or excusable neglect on his part, and accompanied by an affidavit of merits showing facts which constitute a defense to the plaintiff's action. (Holland Bank v. Lieuellen, 127.)
10. **NOTICE BY TELEGRAM—MISTAKE IN SAME—VACATING JUDGMENT.**—A mistake in the transmission of a telegram by the judge of the court for which the party is in no way responsible, and whereby a party is deprived of a hearing upon the trial of a cause, is sufficient ground for vacating a judgment. (Thum v. Pyke, 359.)

See Appeal and Error; Corporations, 5-7; Dismissal; Husband and Wife, 5.

JURISDICTION.

JURISDICTION—VOID ORDER—NOTICE.—An order by which a third party a stranger to the suit without his consent is made a party to an agreed case, under the provisions of chapter 2, title 3, of the Revised Statutes of Idaho, is without authority of law and all the proceedings thereunder are *coram non judice*. (Potter v. Talkington, 649.)

See Courts.

JURY.

1. **SPECIAL FINDINGS BY JURY.**—In equity suits the specific findings of a jury are advisory only. The court may disregard such findings when they are clearly against the evidence. Section 4396, Revised Statutes, recognizes a distinction between law and equity. (Brady v. Yoet, 273.)
2. **JURY TRIAL—EQUITABLE ACTIONS.**—The guaranty found in section 7, article 1 of the constitution, that the right of trial by jury shall remain inviolate, was not intended to extend the right of trial by jury, but simply to secure that right as it existed at the date of the adoption of the constitution. Such provision does not guarantee a jury trial in equitable actions. (Christensen v. Hollingsworth, 87, 94.)
3. **CRIMINAL LAW—CHALLENGING JUROR—IMPLIED BIAS.**—Juror may be challenged for implied bias, on the ground that he is client of op-

JURY (Continued).

posing counsel. Rev. Stats., sec. 7834, subd. 2. (*State v. McGraw*, 635.)

4. **SAME—PEREMPTORY CHALLENGES—ATTORNEY AND CLIENT.**—Defendant in criminal case cannot, on appeal, complain of error of trial court in sustaining challenge to an individual juror, when he accepts the panel before exhausting the peremptory challenges. (*State v. Gordon*, 5 Idaho, 297, 48 Pac. 1061. (*State v. McGraw*, 635.)
5. **EXCUSING JUROR—NEW TRIAL.**—Error in excusing a juror is not ground for a new trial in a criminal action. Rev. Stats., sec. 7941, *State v. McGraw*, 635.)

See Grand Jury.

JUSTICE OF PEACE.

JURISDICTION OF JUSTICES' COURTS.—Under the provisions of section 3851 of the Revised Statutes, justices' courts, in actions arising on contract for the recovery of money, only have jurisdiction where the sum claimed does not exceed the sum of \$300. The sum claimed, including damages or principal and interest thereon, cannot exceed the sum of \$300. Section 22, article 5, of the constitution of Idaho fixes the maximum beyond which the legislature cannot go in fixing such jurisdiction as to value of property claimed or amount in controversy. (*Quayle v. Glenn*, 549.)

See Corporations, 7.

LEGISLATIVE JOURNALS.

See Printing Laws and Journals.

LEGISLATURE.

RECOMMENDATORY DECISION UNDER SECTION 10, ARTICLE 5, OF CONSTITUTION.—Where furniture for legislative halls has been purchased, received and accepted, the legislature should appropriate sufficient to pay for the same; not to do so is unfair, inequitable and savors of repudiation. (*Geo. H. Fuller Desk Co. v. State*, 315.)

LIENS.

ESTOPPEL—PURCHASE PRICE FUND.—Where one has a valid lien on property for the payment of a debt, and such property is sold on a contract made prior to the creation of such debt, and the claimant goes into a court of equity and asks to have his lien claim paid out of the purchase price fund, he is estopped from thereafter resorting to such property to make such debt. (*Idaho Gold Min. Co. v. Winchell*, 729.)

See Mechanic's Lien.

LIMITATION OF ACTIONS.

1. **LIMITATION AGAINST COUNTY.**—Limitation does not run against a county to recover public money wrongfully withheld by one of its fiducial agents. (*Fremont County v. Brandon*, 482.)
2. **STATUTE OF LIMITATIONS AS TO CESTUI QUE TRUST.**—The statute of limitations does not begin to run against a *cestui que trust* until a trust is denied, or some act is done by the trustee, inconsistent with the trust. The record in this case examined and found to fully sustain the findings of the jury and judgment of the court. (*Nasholds v. McDonell*, 377.)
3. **STATUTE OF LIMITATIONS.**—When the statute of limitations of a foreign state is set up as a defense it is error for the court on motion, without a trial, to render a judgment of dismissal for the reason that the plaintiff under the provisions of said section 4217, Revised Statutes, is deemed to have controverted the new matter thus set as a defense and the defendant is put on his proof. The plaintiff may deny the existence of such statute of limitations as pleaded or may confess and avoid it in any manner the law permits. (*Alspaugh v. Reid*, 223.)
4. **ACKNOWLEDGMENT OF DEBT—LIMITATIONS.**—An indorsement upon a note, secured by mortgage, acknowledging the debt evidenced by the note, signed by the maker, who is also the mortgagor does not create, extend or renew either the principal obligation or the mortgage, and is not void under section 3351 of the Revised Statutes, as such acknowledgment affects the remedy on the note and mortgage, and not the contract or obligation thereof. (*Moulton v. Williams*, 424.)

MANDAMUS.

WRIT OF MANDAMUS—SECRETARY OF STATE.—Writ of mandate is the proper proceeding to compel the Secretary of State to file and certify a ticket entitled to filing and certification by such officer. (*Williams v. Lewis*, 184.)

See Executors and Administrators, 3, 4.

MARRIAGE.

ILLEGAL MARRIAGE—DIVORCE—DAMAGES.—Plaintiff, a married woman having a husband from whom she had never been lawfully divorced, married defendant; the latter marriage having been declared null and void, plaintiff brings action to recover damages from defendant for injuries alleged to have been received by her from defendant while they were cohabiting together, by reason of the defendant's having inoculated her with a venereal disease. *Held*, that it not appearing that defendant had induced plaintiff to enter into marital relations with him by any fraud, deceit or misrepresentation, no recovery could be had. (*Deeds v. Strode*, 317.)

MARRIED WOMEN.

See Acknowledgments; Husband and Wife; Mortgages, 2.

MARTIAL LAW.

SUSPENSION OF WRIT—MARITAL LAW—MILITARY FORCES.—The proclamation of the governor declaring Shoshone county to be in a state of rebellion, and his action in calling to his aid the military forces of the United States for the purpose of restoring good order and the supremacy of the law, had the effect to put into force, to a limited extent, martial law in said county and such action is not in violation of the constitution, but in harmony with it, being necessary for the preservation of the government and its necessary self-defense. (In re Boyle, 600.)

MECHANIC'S LIEN.

LIEN—INTERPLEADER ACTION.—A person who files a lien on property for material furnished, and thereafter appears in an interpleader action brought to determine the priority of the rights of creditors to the purchase price paid for the property on which the lien is claimed, and demands that his claim be paid out of said fund, waives such lien and is estopped from foreclosing the same. (Idaho Gold Min. Co. v. Winchell, 729.)

MINES AND MINING.

MINING CLAIMS—OUSTER.—Where one unlawfully ousts the owner from mining claims and in working the same creates debts, such debts are not legal claims for liens against the mining claims. (Idaho Gold Min. Co. v. Winchell, 729.)

See Waters and Watercourses.

MORTGAGES AND TRUST DEEDS.

1. **TRUST DEED A MORTGAGE UNDER STATUTES OF IDAHO.**—A trust deed executed to secure a given debt, payable at a specified time, upon real estate, is, under the statutes of Idaho, a mortgage, and cannot be foreclosed by notice and sale, under a power of sale in such trust deed; and such trust deed can only be foreclosed by judicial sale, pursuant to decree rendered in an action brought therefor in the proper court. (Brown v. Bryan, 1.)
2. **MARRIED WOMAN—MISTAKE IN DESCRIPTION.**—A clerical mistake in the description of land intended to be mortgaged by a married woman may be corrected upon a proper showing. (Christensen v. Hollingsworth, 87, 94.)
3. **REFORMATION AND FORECLOSURE OF MORTGAGE—ALLEGATIONS OF MISTAKE.**—Allegation, in complaint, that parties to a mortgage in-

MORTGAGES AND TRUST DEEDS (Continued).

- tended that certain land (describing it) should be described in and conveyed by such mortgage, and that the scrivener, in drawing the mortgage, omitted, through mistake, the number of the section in which such tract was situated and prays for reformation. *Held*, sufficient to grant reformation. (*Christensen v. Hollingsworth*, 87, 94.)
4. **MORTGAGE—FORECLOSURE.**—A mortgage given to secure the payment of a note is a mere incident to the note, and its foreclosure is not bound so long as an action upon the note is not bound. (*Moulton v. Williams*, 424.)
5. **FORECLOSURE—COUNTERCLAIM SET FORTH IN ANSWER.**—In an action by the mortgagee to foreclose his mortgage, the mortgagor may, in his answer, set forth a counterclaim for purchase money due him from the mortgagee on bargain and sale of realty, and it is reversible error to sustain a demurrer to such counterclaim on the ground that there is "no relation or connection between the subject matter set out in plaintiff's complaint and the said counterclaim." (*Miller v. Hunt*, 523.)
6. **JOINDER OF ACTIONS.**—A mortgage may be reformed and foreclosed in the same action. (*Christensen v. Hollingsworth*, 87, 94.)
7. **FORECLOSURE OF MORTGAGE—USURY—SUIT PREMATURELY BROUGHT.**—In an action brought to foreclose a mortgage, upon the ground that default had been made in the payment of coupon interest notes, which coupon interest notes are declared to be usurious and void (see decisions of this court in *Vermont Loan Trust Co. v. Hoffman*, 49 Pac. 314), the principal note not being due at the time of the commencement of the suit, *held*, that the action is prematurely brought. (*Vermont Loan etc. Co. v. Tetzlaff*, 105; *Vermont Loan etc. Co. v. Maxwell*, 108.)
8. **CHATTEL MORTGAGE—DEED TO REAL ESTATE—FORECLOSURE.**—The V. M. & M. Co., holding a chattel mortgage upon certain personal property of the firm of F. E. & Son, and also a mortgage upon real property of the firm, both of which were given to secure indebtedness due and owing from said F. E. & Son to said V. M. & M. Co., on default, foreclosed the chattel mortgage, F. E. & Son giving a deed to V. M. & M. Co. of the real estate, and thereupon the V. M. & M. Co. executed to said firm of F. E. & Son an agreement in writing conditioned that said V. M. & M. Co. would convey to said F. E. & Son, or either of them, the said personal property, consisting of a sawmill and belongings, and said real estate, if the said firm, or either of them, would pay to said V. M. & M. Co. the amount due said company from said firm at any time within a period of eight months. *Held*, such agreement did not constitute the deed a mortgage. (*Felland v. Vollmer Milling etc. Co.*, 120.)

MORTGAGES AND TRUST DEEDS (Continued).

9. FORECLOSURE OF MORTGAGE—MORTGAGE DEBT—PLAINTIFF ENTITLED TO WHAT IS DUE HIM.—If, in a suit to foreclose a mortgage, the courts should decide that plaintiff is not entitled to a foreclosure, yet, nevertheless the plaintiff should have judgment for any portion of the mortgage debt shown by the pleadings and proof to be due him, against the defendants personally liable therefor. (*Jaekel v. Pease*, 131.)
10. SATISFACTION OF MORTGAGE—COMPLAINT—ALLEGATION OF PAYMENT—DEMURRER.—In an action under the provisions of section 3364 of the Revised Statutes to compel the discharge of a mortgage and to recover damages and penalty, the complaint must contain a direct and unequivocal allegation of payment of the amount secured by such mortgage. (*Gamble v. Canadian etc. Trust Co.*, 202.)
11. PRACTICE—SECTION 3364 OF THE REVISED STATUTES CONSTRUED.—Under the provisions of section 3364 of the Revised Statutes a cause of action does not accrue until the mortgage debt is paid in full and a discharge of the mortgage demanded. (*Barnes v. Pitts Agricultural Works*, 259.)

See Acknowledgments; Attorneys, 2, 3; Chattel Mortgages; Cloud on Title; Public Lands.

MUNICIPAL CORPORATIONS.

1. FUNDING BONDS—DESCRIPTION REQUIRED—SUBMISSION OF QUESTION TO ELECTORS.—Where it is proposed to call an election for the purpose of submitting to the electors of any town or city the question of issuing bonds for the funding of an existing indebtedness of such town or city, and the ordinance providing therefor does not describe the indebtedness sought to be funded, as prescribed by section 2 of the act of February 2, 1899, all proceedings thereunder are invalid. (*Coffin v. Richards*, 741.)
2. CONTRACT BY CITY COUNCIL—ADMINISTRATIVE ACT.—The letting of a contract to do public work by a city council is an administrative, and not a judicial or quasi judicial act. (*Adleman v. Pierce*, 294.)
3. DAMAGES—DEFECTIVE SIDEWALK—SIDEWALK INCLUDED IN STREETS AND PUBLIC GROUNDS.—A sidewalk is included within the term "streets and public grounds" as used in a city charter which makes the city liable to anyone for damages sustained by accident or casualty . . . on account of the condition of any street or public ground" within the city. (*Giffen v. City of Lewiston*, 231.)
4. CITY CHARTER—CONTRIBUTORY NEGLIGENCE.—The provision in a city charter that such city "shall be liable to anyone for any loss or injury to person or property growing out of any casualty or accident happening to any such person or property on account of the

MUNICIPAL CORPORATIONS (Continued).

- condition of any street or public ground therein," does not deprive the city of the ordinary defense of contributory negligence to an action brought against it for damages brought under such charter provision. (*Giffen v. City of Lewiston*, 231.)
5. SAME—ACCOUNTS—DOES NOT APPLY TO TORTS.—A provision in a city charter that "all demands and accounts against the city must be presented to the clerk with the necessary evidence in support thereof, and he must submit the same to the council, who shall by a vote direct whether the same shall be paid or any part thereof, as they may deem it just and legal," does not apply to torts, but to those demands upon which actions *ex contractu* may be brought. (*Giffen v. City of Lewiston*, 231.)
- 5a. INSTRUCTIONS AS TO NEGLIGENCE.—In a suit against a city to recover for personal injury growing out of a defective sidewalk, the court instructed the jury that "negligence on the part of the plaintiff resulting in the injury and without which the injury would not have occurred, would not excuse the city from liability when the city officials had notice of such defect, or could have known of it by the use of reasonable diligence, in time to have prevented it"; *held*, reversible error, as such instruction took from the jury the defense of contributory negligence under the facts of the case at bar. (*Giffen v. City of Lewiston*, 231.)
6. PERSON INJURED KNOWING DANGEROUS CONDITION OF STREET.—Where a person knew prior to an injury received of a dangerous condition in a street, such knowledge would not preclude him from a recovery for an injury received by accident caused by such dangerous condition, provided he used reasonable diligence to avoid injury; but should injury result from his carelessness, he should not recover for such injury. (*Giffen v. City of Lewiston*, 231.)
7. PRACTICE—PREJUDICIAL ERROR.—In an action against a city to recover for an injury received by reason of the dangerous condition of a street, it is prejudicial error to permit the plaintiff to show that after the accident the defendant promptly remedied the defect which caused the accident. (*Giffen v. City of Lewiston*, 231.)
8. EVIDENCE—PRECAUTION—ACCIDENT.—The presence of a light at the place of accident does not excuse a city, which is required to keep its streets in safe condition, from liability for an accident caused by one of its streets being in a dangerous condition, but the presence or absence of such light is a circumstance to be considered by the jury in determining whether the plaintiff was, or was not, guilty of contributory negligence. (*Giffen v. City of Lewiston*, 231.)
9. CHARTER OF BOISE CITY—POWER TO DECLARE WHAT IS, AND TO ABATE NUISANCE.—By the charter of Boise City the mayor and common council are empowered to declare what is a nuisance, and

MUNICIPAL CORPORATIONS (Continued).

are empowered to abate a nuisance. (*Boise City v. Boise Rapid Transit Co.*, 779.)

10. DITCH—EXTENSION OF STREETS OVER.—When a ditch is constructed over public land and thereafter such land is entered by the probate judge as a townsite, and streets are laid out across such ditch, and in the course of time it becomes necessary to bridge such ditch for the reasonable use of the street by the public, it is the duty of the owners to construct such bridge at their own expense. (*Boise City v. Boise Rapid Transit Co.*, 779.)
11. OBSTRUCTION OF STREET—OWNER OF PROPERTY.—The ownership of property is held subject to the restriction that it must be so used as not to injure others, or obstruct the free use of a street. (*Boise City v. Boise Rapid Transit Co.*, 779.)
12. DUTY OF OWNER TO BRIDGE DITCH—PUBLIC NUISANCE.—The city having extended its limits and platted its streets across said ditch, the owner thereof must bridge the same, at his own expense, whenever such ditch obstructs the free passage or use of such streets. If it fails to do so, the ditch becomes a public nuisance, and may be bridged by the city, at the expense of the owner. (*Boise City v. Boise Rapid Transit Co.*, 779.)

See Certiorari, 3.

NEGLIGENCE

See Municipal Corporations.

NEWSPAPERS.

See Contracts.

NEW TRIAL.

1. NEW TRIAL—WHEN SHOULD NOT BE GRANTED.—A new trial should not be granted on the ground of newly discovered evidence where such evidence is merely cumulative, or where it was within the power of the defendant, by the use of reasonable diligence, to have produced such evidence on the trial. (*State v. Davis*, 159.)
2. SAME—GROUNDS STATUTORY.—The grounds for a new trial are statutory and cannot be extended by the courts by rule. (*State v. Davis*, 159.)
3. SAME—GROUND FOR NEW TRIAL—SECTION 7952, REVISED STATUTES. If it be a ground for new trial, under section 7952 of the Revised Statutes, that a juror, prior to the trial, expressed an opinion that the defendant is guilty, which is doubted, one or two *ex parte* affidavits are not sufficient to overcome the positive statement of such juror, made on his *voir dire* examination, that he has no

NEW TRIAL (Continued).

- opinion, and has never formed or expressed an opinion, as to the guilt or innocence of the accused, and such juror is shown to have a good reputation for truth and veracity among his neighbors and acquaintances. (*State v. Davis*, 159.)
4. **NEW TRIAL—CUMULATIVE EVIDENCE.**—When newly discovered evidence tends to establish a new or independent fact not testified to at the trial, although its effect be to establish a position sought to be established at such trial, such newly discovered evidence is not cumulative within the meaning of the rule prohibiting the granting of a new trial upon newly discovered cumulative evidence. (*Twin Springs Placer Co. v. Upper Boise etc. Min. Co.*, 687.)
5. **SAME—JUDICIAL DISCRETION.**—The granting of a new trial is a matter largely within the discretion of the trial court, and an order granting a new trial will not be reversed unless there has been a clear abuse of such discretion in granting it. (*Twin Springs Placer Co. v. Upper Boise etc. Min. Co.*, 687.)
6. **NOTICE OF INTENTION TO MOVE FOR A NEW TRIAL—TIME FOR FILING.**—An appeal from an order denying a new trial will be dismissed when it is shown that the notice of intention to move for a new trial was not filed and served upon the adverse party within ten days after the verdict as required by statute. (*Fox v. Rogers*, 710.)
7. **STATEMENT ON MOTION FOR A NEW TRIAL.**—Under the provisions of subdivision 3, section 4441, of the Revised Statutes, a statement on motion for a new trial must specify the particular errors relied on. (*Warren v. Stoddart*, 692.)
8. **NEW TRIAL—MOTION TO CORRECT DECREE.**—An order granting a new trial will not be reversed on appeal, unless it is made to appear that there has been a manifest abuse of discretion in granting a new trial. (*Brossard v. Morgan*, 479.)

See Jury, 5.

NONSUIT.

- PRIMA FACIE CASE—NONSUIT.**—When the evidence of the plaintiff establishes a *prima facie* case, motion for nonsuit at close of plaintiff's testimony is properly denied. (*Simpson v. Remington*, 681.)

NUISANCES.

See Municipal Corporations, 9-12.

OFFICERS.

1. **CONSTITUTIONAL LAW.**—The appointment of a deputy under the provisions of section 6, article 18 of the constitution of Idaho is not the creation of an office. (*Dunbar v. Canyon County*, 725.)

OFFICERS (Continued).

2. **LIABILITY OF POSTMASTER—OFFICIAL BOND.**—While a postmaster is liable to private parties for money or property coming to his hands as such postmaster, and lost through wrongful act, neglect or default, of such postmaster, his assistants or servants, an action to recover the same should be brought against the postmaster, and not upon his official bond. (*Idaho Gold Reduction Co. v. Croghan*, 471.)
3. **REMOVAL OF PUBLIC OFFICER.**—A proceeding for the removal of an officer under section 7459 of the Revised Statutes, is not required to be brought by indictment or information by the public prosecutor: *Rankin v. Jauman*, 4 Idaho, 53, 394, 36 Pac. 503, 39 Pac. 111; affirmed. (*Hays v. Simmons*, 651; *Hays v. Young*, 654.)
4. **CONSTITUTIONAL LAW — SALARIES — COUNTY OFFICERS — PUBLIC POLICY.**—The legislature has authority to provide by statute the maximum and minimum salary of county officers, and may vest in the boards of county commissioners the discretionary authority of determining the amount of salary of county officers within the limit of such maximum and minimum salary, except the salary of such county commissioners. Public policy forbids that any officer be empowered to fix his own compensation. (*Stookey v. Board of Commrs. of Nez Perces Co.*, 542.)
5. **SURETIES—LIABILITY.**—The sureties of an officer mentioned in section 403 of the Revised Statutes are liable to any person injured or aggrieved by a wrongful act done by the officer in his official capacity. (*Palmer v. Pittingill*, 346.)
6. **COUNTY ASSESSOR AND TAX COLLECTOR—DEPOSITED ON GENERAL DEPOSIT.**—C., as assessor and tax collector for the county, paid into the bank of B. & Co. a sum of money collected by him as such official, and subsequently gave to W., the outgoing treasurer of said county, a check for \$50,539.03, and the cashier of said bank, without the knowledge or consent of the incoming treasurer, passed a portion of said amount to the credit of the incoming treasurer; *held*, that this did not constitute "a deposit on general deposit" by such incoming treasurer. (*County of Bingham v. Woodin*, 284.)
7. **EVIDENCE, DOCUMENTARY.**—In an action on treasurer's bond the plaintiff was permitted, over the objection of defendants, to introduce the ledger of a banking company and to read in evidence certain entries therefrom, there being no proof as to who made the entries or when they were made, or that the treasurer had any knowledge of or ever consented to such entries. *Held*, error. (*County of Bingham v. Woodin*, 284.)

See Banks and Banking, 2; Clerk of Court; Counties.

PAROL EVIDENCE.

See Attachment, 3; Contracts, 3; Frauds, Statute of.

PARTNERSHIP.

PARTNERSHIP.—Held under facts of this case no partnership existed. (Wilson v. Wilson, 597.)

PHYSICIANS.

See Coroner's Inquest.

PLEADING AND PRACTICE.

1. **PUBLICATION OF SUMMONS.**—Allegations that a "judgment is void," and that an affidavit for publication of summons is "inefficient," are statements not of fact, but of legal conclusions. (Ollis v. Orr, 474.)
2. **COURT MUST GRANT ANY RELIEF EMBRACED WITHIN THE ISSUES.**—Under the provisions of section 4353 of the Revised Statutes, when an answer is filed, the court may grant any relief consistent with the case and embraced within the issues. (Stocker v. Kirtley, 795.)
3. **DENIAL ON INFORMATION AND BELIEF.**—A denial on information and belief of matters of public record is not sufficient. (Simpson v. Remington, 681.)
4. **PLEADINGS—PRACTICE—DEMURRER—ANSWER.**—Objections to a complaint that "the action is not brought in the name of the real parties in interest, as is shown by the face of the complaint"; "that the plaintiff has not legal capacity to sue in this action; that several causes of action have been improperly united"; "that the complaint is ambiguous, unintelligible and uncertain," must be taken by demurrer, or answer, and when not so taken will be deemed to be waived. (Carter v. Wann, 556.)
5. **SAME—GENERAL DEMURRER.**—When the complaint states a good cause of action, although joined with a cause of action that is demurrable, a general demurrer that the complaint does not state facts sufficient to constitute a cause of action, will not lie. (Carter v. Wann, 556.)
6. **PLEADINGS—NONSUIT—CROSS-COMPLAINT.**—In an action by the plaintiffs against numerous defendants to settle the rights of the parties to the waters of a certain stream, various defendants having, in addition to their answers to the complaint of plaintiffs, filed cross-complaints asking affirmative relief against both the plaintiffs and certain of their codefendants, the plaintiffs having been nonsuited, the court, on motion of certain of the defendants,

PLEADING AND PRACTICE (Continued).

- dismissed the cross-complaints of the other defendants. *Held*, error: The cross-complainants were entitled to be heard upon their cross-complaints in the action then pending. (*Taylor v. Bartholomew*, 500.)
7. **PLEADING**.—A defect in a complaint may be cured by allegation in the answer. (*State v. Thum*, 323.)
 8. **PLEADING—PROCEDURE**.—An amendment to a complaint not in matter of substance and unnecessary to be made is not required to be served upon defendant. (*Curtis v. Bunnell etc. Inv. Co.*, 298.)
 9. **PLEADING**.—Where the complaint fails to set forth a material fact essential to the establishment of plaintiff's right to recover, the complaint is bad on general demurrer. (*County of Bingham v. Woodin*, 284.)
 10. **PLEADING—REFUSAL TO ESTABLISH DEFENSE BY PROOF**.—Where the demurrer to an answer is sustained and a new answer is filed setting up the same defense, to which no objection is made, and the party making such answer withdraws from the case and refuses to establish his defense by proof, the error committed in sustaining demurrer not prejudicial. (*Barnes v. Pitts Agricultural Works*, 259.)
 11. **PLEADINGS**.—Under the provisions of subdivision 2, section 4168, in actions *ex contractu* or *ex delicto* the pleader is required to make in his complaint a statement of the facts constituting the cause of action in ordinary and concise language. (*Elliott v. Collins*, 266.)
 12. **PRACTICE—AMBIGUITY AND UNCERTAINTY IN COMPLAINT—REACHED BY SPECIAL DEMURRER**.—Ambiguity and uncertainty in a complaint which states a cause of action, but not with that certainty contemplated by the code, cannot be reached by an objection to the introduction of evidence under the complaint, but only by special demurrer pointing out the ambiguity and uncertainty complained of by the defendant. (*Naylor v. Vermont Loan etc. Co.*, 251.)
 13. **AVERMENTS OF ANSWER—NEW MATTER—DEEMED DENIED**.—Under the provisions of section 4217, Revised Statutes, when new matter is pleaded in the answer in avoidance or as constituting a defense or counterclaim, such new matter is deemed denied or controverted by the plaintiff. (*Alsbaugh v. Reid*, 223.)
 14. **SHAM AND FRIVOLOUS ANSWERS**.—An answer which contains denials upon information and belief of matters which are entirely made up of the files and records in a case in which the defendant was a principal party is properly stricken out as sham and frivolous. (*First Nat. Bank of Moscow v. Martin*, 204.)
 15. **PLEADINGS—DENIAL IN CONJUNCTIVE**.—As used in the complaint, the words "sold and delivered" constitute but one act. The word

PLEADING AND PRACTICE (Continued).

- "sold" as there used includes "delivery" and a denial of that act in the conjunctive raises an issue. *Held*, under facts of this case that respondent was liable for debt sued on. (*Feldman v. Shea*, 717.)
16. **PRACTICE—DEMURRER.**—*Held*, that the complaint states a cause of action, and demurrer properly overruled. (*Simpson v. Remington*, 681.)
17. **PLEADING—ELECTION IRREGULARITIES.**—A complaint in this case examined and held not to state cause of action. (*Ball v. Campbell*, 754.)
18. **COMMINGLING CAUSES OF ACTION IN SAME COUNT—DEMURRER—MOTION TO STRIKE.**—The commingling of several causes of action in one count of the complaint is prohibited by the code, but such commingling is not ground for demurrers, the remedy in such case being by motion to elect, and strike out. (*Fox v. Rogers*, 710.)
19. **DEFENSES.**—*Held*, that the answer set up two separate defenses and that it was error to strike such defenses out. (*Warren v. Stoddart*, 692.)

See Dismissal of Action.

POLITICAL CONVENTIONS.

See Elections.

POLL TAX.

See Taxation.

POSTMASTERS.

See Officers, 2.

PRELIMINARY EXAMINATION.

See Criminal Law, 8.

PRINCIPAL AND AGENT.

See Usury.

PRINCIPAL AND SURETY.

See Appeal and Error, 14-16; Officers.

PRINTING LAWS AND JOURNALS.

1. **APPROPRIATION FOR PRINTING AND BINDING JOURNALS.**—Where an appropriation is made by the legislature for "publishing the journals

PRINTING LAWS AND JOURNALS (Continued).

- of the Senate and House and the Sessions Laws," such act is intended only to provide compensation for the printing and binding thereof. (Anderson v. Lewis, 51.)
2. **COPIES OF LAWS AND JOURNALS—SECRETARY'S DUTY TO PREPARE.**—It is part of the official duty of the Secretary of State to prepare the copies of the laws and journals for the printer. (Anderson v. Lewis, 51.)
 3. **FEES PAID TO SECRETARY BELONG TO STATE TREASURY.**—Where the Secretary of State has received fees for making such copies, such fees are required to be paid into the state treasury by the Secretary of State under the provisions of section 19, article 4 of the constitution. (Anderson v. Lewis, 51.)
 4. **SAME—AS TO FURNISHING COPIES TO PRINTING COMPANY.**—Where the Secretary of State makes a contract with a printing company, to publish the laws and journals by the terms of which contract the secretary is to receive a certain portion of the contract price for the preparation of the copies for the printer, such contract is within the prohibitions of section 385 of the Revised Statutes of Idaho. (Anderson v. Lewis, 51.)

PROBATE COURT.

See Descent and Distribution; Executions; Executors and Administrators.

PROCESS.

SERVICE OF SUMMONS OUT OF THE STATE—DEFAULT—VOID JUDGMENT.—When, after order for publication of summons against an absent defendant has been duly made, the summons is personally served on such absent defendant out of the state, such service does not become complete until the expiration of the time prescribed in the order for publication; and where such order prescribed one month for such publication, as in the case at bar, the defendant served out of the state has one month and forty days in which to answer and a default judgment entered against him during said time is void and will be reversed on appeal. (Bowen v. Harper, 654.)

See Corporations, 5-7; Divorce.

PROHIBITION, WRIT OF.

WRIT OF PROHIBITION—SECRETARY OF STATE.—Writ of prohibition, under the statutes of Idaho, will lie to restrain the action of a ministerial officer, when it appears that such action is illegal and beyond his jurisdiction as the Secretary of State in certifying to the county auditors a ticket not entitled to be certified. (Williams v. Lewis, 184.)

PROMISSORY NOTES.

See Bills and Notes.

PUBLIC LANDS.**PURCHASE PRICE MORTGAGE—SIGNING BY WIFE—COMMUNITY PROPERTY.**

Where H. made settlement upon the public domain subject to the pre-emption laws of the United States, and made pre-emption filing for the same and resided thereon, with his wife, and thereafter, while so residing thereon with his said wife, he borrowed money of K. with which to pay the government price for said land, and executed a mortgage to secure the payment of the same to K., and thereafter, on the same day, made his final proof for said land and paid the government price therefor from the money so borrowed, said mortgage is a purchase price mortgage, and is a valid lien on said land, whether signed by the wife or not, and is prior to any right she may have to said land, as community property, by reason of having resided thereon at the date of the execution of said mortgage. The term "price of real property," as used in section 3336 of the Revised Statutes, is the money paid for real property or the debt created by the purchase thereof. (*Kneen v. Halin*, 621.)

See Townsites.

PUBLIC MONEY.

See Banks and Banking.

PUBLIC OFFICERS.

See Officers.

PUBLIC WORK.

See Municipal Corporations, 1, 2.

QUIETING TITLE.

See Cloud on Title.

RAILROADS.**1. RAILROAD COMPANY—KILLING OF STOCK—PLEADING—NEGLIGENCE.—**

Under subdivision 2, section 4168 of the Revised Statutes, which requires the complaint to contain a statement of the facts constituting the cause of action in ordinary and concise language, a general allegation of negligence, while good against a general demurrer, is not good against a demurrer on the ground of uncertainty. (*King v. Oregon Short Line Ry.*, 306.)

RAILROADS (Continued).

2. **LIABILITY FOR INJURY TO ANIMALS.**—Railroad company held not liable for injury to animals, where there is an entire absence of proof of negligence on the part of the railroad company. (*Jones v. Oregon Short Line Ry.*, 441.)
3. **RAILROADS—FENCING TRACKS.**—Under the provisions of section 2679 of the Revised Statutes, railroad corporations must make and maintain a good and sufficient fence on both sides of its track where the line passes through private land. (*Patrie v. Oregon Short Line R. R. Co.*, 448.)
4. **SAME—STOCK KILLED.**—If it fails to do so, it is liable for stock killed at the point where it is required to fence its track. (*Patrie v. Oregon Short Line R. R. Co.*, 448.)
5. **SAME LIABILITY OF RAILROAD—STALLION RUNNING AT LARGE.**—Under the provisions of section 1240 of the Revised Statutes, and act amendatory thereof (*Sess. Laws 1891*, p. 48), a stallion that escaped from its owner without his fault, and is killed by a railroad, at a point where the company is required by law to fence its track, and has not done so, is liable to the owner for the value of the stallion. (*Patrie v. Oregon Short Line R. R. Co.*, 448.)

See Taxation, 3.

RAPE.

1. **INSTRUCTIONS—REASONABLE DOUBT.**—It was not error for the court to refuse to instruct the jury, that however slight the "reasonable doubt" might be if fairly based on the evidence, the defendant must be acquitted. (*State v. Anthony*, 383.)
2. **RAPE—INSUFFICIENCY OF EVIDENCE.**—Where improper and prejudicial evidence is introduced by the state, a judgment against the defendant must be set aside, and the cause remanded. (*State v. Anthony*, 383.)
3. **SAME—SUBSTANTIAL CONFLICT IN EVIDENCE.**—Where there is a substantial conflict in the material evidence, and there has been improper and prejudicial evidence introduced by the state, this court will not undertake to determine whether the conflicting evidence is sufficient to establish the guilt of the defendant beyond a reasonable doubt. (*State v. Anthony*, 383.)
4. **RAPE—ASSAULT—VERDICT—EVIDENCE OF INTENT.**—A verdict of guilty on the charge of assault with intent to commit rape will not be disturbed where the evidence shows an assault, and the question of intent is fairly submitted to the jury, although the evidence bearing upon the question of intent may be slight. (*State v. Beard*, 614.)
5. **RAPE—VERDICT—EVIDENCE.**—Evidence in this case examined and held not to support verdict of guilty. (*State v. Baker*, 496.)

RAPE (Continued).

6. **RAPE—UNCORROBORATED TESTIMONY OF PROSECUTRIX.**—While a conviction for rape may be properly had upon the uncorroborated testimony of a prosecutrix, this would only be warranted when the reputation of the prosecutrix for chastity is unimpeached, and when the facts and circumstances surrounding the commission of the offense are corroboration and not contradictory of the statements of the prosecutrix. (*State v. Anderson*, 706.)
7. **SAME—INSTRUCTIONS—PREJUDICIAL ERROR.**—In a prosecution for rape, an instruction which virtually instructs the jury that they may find corroboration of the testimony of the prosecutrix in her own statements is misleading and amounts to prejudicial error. (*State v. Anderson*, 706.)

RECEIPTS.

See Contracts, 3.

RECEIVERS.

1. **PLEADING—MISJOINDER OF PARTIES.**—Where a corporation has passed into the hands of a receiver, it is error to join such corporation with the receiver in an action to recover money alleged to be due said receiver. (*Idaho Gold Reduction Co. v. Croghan*, 471.)
2. **CERTIORARI—RECEIVER—NOTICE—VOID ORDER.**—After appearance in the action, the defendant is entitled to notice of motion for the appointment of a receiver in the action and an order made by the judge after such appearance, without notice to the defendant, is without jurisdiction and void. *Certiorari* lies to annul an order appointing a receiver which was made on *ex parte* application after appearance of the defendant in the action. (*Cummings v. Steele*, 666.)
3. **CERTIORARI—JURISDICTION—RECEIVER.**—*Certiorari* will lie to review an order appointing a receiver, so as to determine from the case as presented to the lower court whether jurisdiction existed in such court, in the particular case made to appoint a receiver. (*Sweeny v. Mayhew*, 455.)
4. **SECTION 4329 OF THE REVISED STATUTES CONSTRUED.**—It is error to appoint a receiver in any of the class of cases mentioned in section 4329 of the Revised Statutes of Idaho, where the equities of the complaint are fully denied by the answer and the evidence introduced by plaintiff on the hearing of the application for the appointment of such receiver is fully met and overcome by counter-evidence introduced by the defendant. (*Sweeny v. Mayhew*, 455.)
5. **PLEADING—EQUITIES DENIED BY ANSWER—APPOINTMENT OF RECEIVER.**—Plaintiff applied for appointment of a receiver; defend-

RECEIVERS (Continued).

ants filed their sworn answer denying every equity, and material allegation set forth in the complaint; on the hearing of the application, the pleadings, the affidavit of plaintiff and one witness in his behalf, the affidavits of three witnesses on behalf of the defendants, were considered by the district judge; it was not alleged or proven that the defendants were insolvent or unable to respond to the plaintiff in damages. *Held*, that under such showing, the order made by the district judge was without authority, and should be annulled by *certiorari*. (*Sweeny v. Mayhew*, 455.)

See Taxation, 4, 5.

REFORMATION OF INSTRUMENTS.

See Mortgages and Trust Deeds, 3-6.

REHEARING.

See Appeal and Error, 5.

REMOVAL OF CAUSES.

See Courts.

REPLEVIN.

See Sales.

RES JUDICATA.

See Judgments.

REVIEW, BILL OF.

1. **BILL OF REVIEW.**—A bill of review will not lie to obtain a new trial, where the party seeking such relief has been guilty of any laches or blunders by which he lost his rights in the original action. (*McMillan v. Wooley*, 36.)
2. **SAME—WHAT MUST BE ALLEGED.**—In an equitable action commenced for the purpose of procuring a new trial of a former action, the complaint, designated in equity practice "bill of review" must affirmatively show that by reason of fraud, mistake or surprise, against which the complainant could not, by the use of reasonable diligence, have protected himself against in the original action, by motion for new trial, by application to vacate or modify the judgment on the ground of mistake, inadvertence, surprise or excusable neglect, made within six months after the adjournment of the term at which the judgment was rendered, or by appeal, thus showing a necessity of resorting to equity. (*McMillan v. Wooley*, 36.)

REVIEW, BILL OF (Continued).

3. SAME—TIME WITHIN WHICH IT MUST BE FILED.—A bill of review must be filed within the time within which an appeal could be taken from the judgment sought to be reviewed. (*McMillan v. Wooley*, 36.)

REVIEW, WRIT OF.

See *Certiorari*.

ROBBERY.

EVIDENCE.—Where it appeared from the evidence that the defendant, the prosecuting witness, and others, had been together drinking from 10 o'clock in the evening until 5 o'clock in the morning, when the robbery was alleged to have taken place, the prosecution upon the trial having confined their examination of the prosecuting witness to the first meeting of said witness, and the defendant, and to the occurrences at the time of the alleged robbery, leaving an interim of some seven hours, during which it seems the parties were continually together, unexplained. It was error to refuse to permit the defense to interrogate the prosecuting witness, as to his acts and whereabouts during such interim. (*State v. Webb*, 429.)

SALARIES.

See *Fees and Salaries*.

SALES.

CLAIM AND DELIVERY—CHANGE OF POSSESSION.—S. sold and delivered a certain number of cattle to T. After such sale and delivery T. sold and delivered to the defendant eleven head of said cattle; defendant took possession of the cattle so sold to him, and placed them in the custody of his brother. Subsequently, a question having arisen between S. and T. in regard to a balance claimed by S. from T. upon the sale between them, S. without the knowledge or consent of defendant seized and took into his possession the cattle sold by T. to defendant, *held*, that the continuity of defendant's possession having been broken by the unlawful act of plaintiff's vendor, plaintiff cannot invoke the provisions of section 3021 of the Revised Statutes to defeat defendant's title. (*Couch v. Montgomery*, 669.)

See *Chattel Mortgages*, 2.

SECRETARY OF STATE.

See *Mandamus*; *Printing Laws and Journals*.

SETOFF AND COUNTERCLAIM.

See *Appeal and Error*, 4; *Mortgages and Trust Deeds*, 5.

SHERIFFS.

1. **PAYMENT OF SHERIFF'S FEES—SHERIFF MUST ACCOUNT FOR FEES EARNED.**—Under the laws of Idaho, a sheriff may recover fees allowed by law for services rendered by him, although he failed to require payment of such fees in advance, but he must account to his county for all fees earned, whether collected by him or not. (*Naylor v. Vermont Loan etc. Co.*, 251.)
2. **APPOINTMENT OF DEPUTY SHERIFF—NECESSITY OF.**—Before the county commissioners can legally empower the sheriff to appoint a deputy under the provisions of section 6, article 18, Idaho constitution, they must find that the business of such sheriff's office requires the appointment of a deputy. (*Taylor v. Canyon Co.*, 466.)
3. **COUNTY COMMISSIONERS—NECESSITY OF APPOINTMENT WILL NOT BE INFERRED.**—That fact will not be inferred from the facts that the county commissioners, in considering said matter, examined certain evidence, and, after being advised in the matter, empowered the sheriff to appoint a deputy. (*Taylor v. Canyon Co.*, 466.)
4. **ALLEGATIONS OF COMPLAINT--DEMURREE.**—The complaint of the sheriff in an action against the county to recover the salary of a deputy must allege that the county commissioners found that the business of said sheriff's office required the appointment of a deputy. (*Taylor v. Canyon Co.*, 466.)

SIDEWALKS.

See Municipal Corporations.

SPECIFIC PERFORMANCE.

1. **SPECIFIC PERFORMANCE.**—A court of equity will decree a specific performance of a contract for the sale of chattels when damages at law will not afford a complete and adequate remedy. (*Brady v. Yost*, 273.)
2. **CONTRACT—SPECIFIC PERFORMANCE.**—A party to a contract, in order to obtain judgment for the specific performance of the contract, must show that such contract is fair, complete, mutual, reasonable and based upon an adequate consideration. (*Bear Track Min. Co. v. Clark*, 196.)
3. **SAME—WHEN WILL NOT BE ENFORCED.**—A contract by which C., the owner of a one-half interest in a mining claim, agreed to convey such interest to M., solely in consideration of the doing of certain development work on said mining claim by M., is neither fair, mutual, reasonable, nor based on an adequate consideration, and cannot be enforced by judicial decree. (*Bear Track Min. Co. v. Clark*, 196.)

STATE CAPITOL.

1. **CAPITOL BUILDING FUND.**—Under the provisions of an act providing for the erection of a capitol building at Boise City and the issuance of state bonds and creating a capitol building fund out of which said bonds and interest thereon were to be paid (see Special and Local Laws of Idaho, p. 14), it was not intended to create a permanent capitol building fund. (*Steunenberg v. Storer*, 44.)
2. **TEMPORARY STATUTE—AUDITOR—TREASURER.**—Said fund was temporary and only to continue until said bonds and interest were fully paid, and after that the revenue appropriated to said fund must be turned in to the general fund of the state, until otherwise provided by law. (*Steunenberg v. Storer*, 44.)

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

PASSAGE OF BILL BY LEGISLATURE.—Act of February 19, 1895 (*Session Laws 1895*, p. 19), amending section 6765 of the Revised Statutes, properly passed by both houses of the legislature. (*State v. McGraw*, 635.)

See Printing Laws and Journals.

STIPULATIONS.

STIPULATION.—A stipulation of parties in disregard of the rules of the court will not be regarded by the court. (*First Nat. Bank of Moscow v. Martin*, 204.)

STOCK AND STOCKHOLDERS.

See Corporations.

STREETS.

See Municipal Corporations.

SUBROGATION.

1. **SUBROGATION.**—When a person, being under obligation to do so, or is interested in so doing, pays the debts of another, he may be sub-
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SUBROGATION (Continued).

rogated to all the rights, securities or remedies of the creditor whom he satisfies. (*Wilson v. Wilson*, 597.)

2. **SAME.**—When one voluntarily, and as a mere volunteer, having no interests to protect, pays the debts of another, the payment operates as an extinguishment of the claim and doctrine of subrogation does not apply. (*Wilson v. Wilson*, 597.)

SUMMONS.

See Process.

SUPPLEMENTARY PROCEEDINGS.

See Executions, 2.

TAXATION.

1. **ASSESSORS AND COLLECTORS—POLL TAX—AMOUNT TO BE COLLECTED.**—Under act of January 19, 1889, which was continued in force by the provisions of the constitution, it is the duty of the county assessors and collectors to collect on each poll after the second Monday in December, the sum of three dollars and fifty cents, and when he collects on such polls only the sum of three dollars after the second Monday of December, he must account to the county for the additional fifty cents on each poll so collected. (*Sponberg v. Oneida County*, 722.)
2. **TAXES—STATE EXEMPT.**—Lands belonging to the state are exempt from taxation, and no title can be acquired to the same by a tax deed. (*State v. Stevenson*, 367.)
3. **TAXATION ASSESSOR—BOARD OF EQUALIZATION—RAILROAD PROPERTY.**—Property of a railroad company, other than "rolling stock" outside of the "right of way" "railroad track" as defined by the statute of this state, is assessable by the local assessor, and not by the state board of equalization. (*Oregon Short Line Ry. v. Gooding*, 773.)
4. **RECEIVER—TAXES—ASSESSMENT.**—When money or property in litigation is in the hands of a receiver of the court, and is assessed to such receiver, the taxes must be paid thereon by the receiver under the direction of the court. (*Palmer v. Pettingill*, 346.)
5. **SALE OF PERSONAL PROPERTY IN HANDS OF RECEIVER FOR TAXES.**—Personal property in the hands of such receiver is not subject to seizure and sale for the collection of the taxes thereon. (*Palmer v. Pettingill*, 346.)
6. **TAX LIENS.**—The only tax liens in this state are those created by statute. (*Palmer v. Pettingill*, 346.)

TAXATION (Continued).

7. **SAME.**—Section 1413 of the Revised Statutes makes every tax due on personal property a lien upon the real property of the owner. (Palmer v. Pettingill, 346.)
8. **SAME—WHEN TAX LIEN ON PERSONAL PROPERTY.**—The tax levied on personal property is not a lien thereon, at least until such property has been seized by the tax collector for the purpose of making the tax by sale of the property. (Palmer v. Pettingill, 346.)
9. **COUNTY COMMISSIONERS—NO AUTHORITY TO REFUND TAX—COURT WILL NOT PASS ON VALIDITY OF LAW UNLESS NECESSARY.**—Boards of county commissioners have no authority to refund a tax that has been paid, whether the tax was illegal or not. Boards of commissioners are not clothed with judicial functions, and are not authorized to pass upon the validity of a statute. Courts will not pass upon the validity of a statute in any case unless necessary to a decision of the case under consideration. (Howell v. Board of Commrs. of Ada Co., 154.)

TAX ASSESSORS AND COLLECTORS.

1. **DEPUTIES OR CLERKS TO ASSESSOR.**—Assessors and collectors are not entitled to deputies or clerks at the public expense. (Fremont County v. Brandon, 482.)
2. **TAX COLLECTORS—COMMISSIONS—SCHOOL MONEY.**—Tax collectors are not entitled to commissions on school money collected under the general county levy. (Fremont County v. Brandon, 482.)
3. **FEES—DEED TO COUNTY.**—Tax collectors are not entitled to a fee for making a deed to the county for property sold for delinquent taxes, and struck off to the county. (Fremont County v. Brandon, 482.)

See Officers, 6, 7.

TAXES—BOARD OF EQUALIZATION.

1. **BOARD OF EQUALIZATION.**—Section 1483 of the Revised Statutes as amended by act of March 13, 1899, does not contravene the provisions of the constitution. (Murphy v. Board of Equalization, 745.)
2. **ASSESSOR—CONSTITUTIONAL LAW.**—A county assessor should make such changes upon the assessment-roll of his county as the board of equalization for his county has ordered, relative to the assessment of an individual taxpayer. (Murphy v. Board of Equalization, 745.)
3. **SAME—JURISDICTION.**—A board of county commissioners, acting as a board of equalization, has jurisdiction to order additions made to the list of property assessed to an individual taxpayer. (Murphy v. Board of Equalization, 745.)

TAXES—BOARD OF EQUALIZATION (Continued).

4. **SAME—WRIT OF REVIEW.**—Mere irregularity in the exercise of a rightful power by a board of equalization will not be reviewed on *certiorari*. (Murphy v. Board of Equalization, 745.)
5. **SAME—INCREASING LIST OF PROPERTY—PRESUMPTION.**—Courts will not presume that orders made by a board of equalization increasing the list of property assessed to an individual tax payer was made without evidence. (Murphy v. Board of Equalization, 745.)

TELEGRAM.

See Judgments, 10.

THREATS.

See Criminal Law.

TOWNSITES.**EJECTMENT—PUBLIC DOMAIN—TOWNSITE OCCUPANT.—ABANDONMENT.**

An occupant upon the public domain of the United States, which land is thereafter platted into blocks, streets and alleys, and entered as provided by an act of Congress, approved March 2, 1867, and known as the Townsite Act, may lose whatever right he acquired by prior occupancy and possession by abandonment, and such abandonment may be inferred from his acts and declarations, and from the declarations of such occupant's grantee. (Boise City v. Flanagan, 149.)

TRANSCRIPT.

See Appeal and Error, 6.

TRIAL.

1. **PRACTICE.**—In making an opening statement to the jury counsel has no right to state his views of the law of the case. Such opening statement should be confined to pointing out the issues made by the pleadings, and stating the facts which the party expects to prove. (Giffen v. City of Lewiston, 231.)
2. **PRACTICE—INTRODUCTION OF EVIDENCE.**—The practice of opening a case to permit a party to introduce evidence in chief, after he has closed his case, while a matter of discretion in the trial court, should be discouraged to the extent of requiring the moving party to show good excuse, such as inability to produce before closing that the evidence was discovered afterward or other good reason. (Giffen v. City of Lewiston, 231.)
3. **BEHAVIOR OF COUNSEL ON THE TRIAL.**—It is not proper for counsel, while arguing a cause to the jury, to question the motives of opposing counsel in objecting to the introduction of evidence on

TRIAL (Continued).

- the ground that it is immaterial, incompetent or irrelevant. (*Giffen v. City of Lewiston*, 231.)
4. **FINDINGS.**—The finding of facts must respond to all of the material issues. (*Wilson v. Wilson*, 597.)
 5. **SPECIAL FINDINGS OF JURY—VERDICT.**—In an action to abate a nuisance, where special findings are made by the jury, they do not become the verdict in the case, as that term is used in section 4912 of the Revised Statutes, as amended by the act of 1885, until they are adopted by the court. (*Peters v. Leflang*, 364.)
 6. **VERDICT—RESORT TO CHANCE.**—A verdict which is reached as the result of resort to chance should be set aside, and the affidavit of a juror is competent under the provisions of section 4439, Revised Statutes of Idaho, to show that the verdict was reached by resorting to chance. (*Giffen v. City of Lewiston*, 231.)
 7. **INTERROGATORIES TO JURY—SPECIAL VERDICT.**—The submission of interrogatories to the jury for the purpose of obtaining a special verdict is largely a matter of discretion, and it is not an abuse of such discretion to refuse to submit such interrogatories in a cause when the issues are not complicated. (*Giffen v. City of Lewiston*, 231.)

See Instructions.

TRUST DEEDS.

See Mortgages.

TRUSTS.

1. **TRUST—EVIDENCE.**—One who takes title to real estate, purchased with funds of another, and for the benefit of the latter, holds as trustee, and parol evidence is admissible to establish such trust. (*Bramstetter v. Mann*, 580.)
2. **TRUST AND TRUSTEE—AGENCY—RIGHT OF ACTION—STATUTES OF FRAUD.**—One, Sullivan, being indebted to the plaintiff, and being about to leave the state, together with the defendant, and for the purpose of securing the payment to the plaintiff of the money so due her from said Sullivan, executed and delivered to James Burns, the brother of plaintiff, and acting as her agent, the following writings: "Pocatello, Idaho, March 4th, 1897. I hereby authorize A. F. Caldwell to sell my property for \$2,100.00, and pay James Burns \$500.00, in case the property cannot be sold for any more in the next sixty days. (Signed) Garrett Sullivan. "I hereby comply with the above in case there is a sale made of the property. I have full charge of the property. (Signed) A. F. Caldwell." Held, that upon a sale of the property as above set forth, defendant becomes liable to the plaintiff for the sum

TRUSTS (Continued).

of \$500, and a right of action accrued to her therefor. (Smith v. Caldwell, 436.)

3. GUARANTY.—No question of guaranty can be predicted upon said writings, nor does the transaction come within the statute of frauds. (Smith v. Caldwell, 436.)

See Limitation of Actions, 2.

USURY.

1. USURIOUS CONTRACTS.—Under the laws of this state an action may be maintained on a usurious contract for the recovery of the principal sum loaned. Such a contract is not void. (Portneuf Lodge, I. O. O. F. v. Western Loan etc. Co., 673.)
2. SAME—SECTION 1266 OF THE REVISED STATUTES.—KIND OF JUDGMENT TO BE ENTERED UNDER.—The provisions of section 1266 of the Revised Statutes direct the kind of a judgment to be entered in actions on a usurious contract, but does not prescribe any particular action for such contracts. (Portneuf Lodge, I. O. O. F. v. Western Loan etc. Co., 673.)
3. USURY—JUDGMENT UPON STIPULATION.—Plaintiff brought action upon an usurious contract; judgment was entered upon stipulation of parties in favor of plaintiff, as prayed in complaint, from which defendant appealed; *held*, that the judgment so entered, being in contravention of the usury laws of the state, the same was erroneous. The general rule, that where judgment is entered upon the agreement and consent of parties appeal will not lie, does not apply to a case where such agreement and judgment is in contravention of the positive provisions of a statute. (Ocobock v. Nixon, 552.)
4. USURY.—Under the laws of Idaho, building and loan associations cannot charge, directly or indirectly, usurious interest on loans. (Fidelity Sav. Association v. Shea, 405.)
5. SAME—EVASION OF USURY LAWS.—One who comes into Idaho and loans money upon real estate there situated cannot evade and defeat the usury laws of the state by stipulating in the contract of loan that the contract shall be tested, and its validity determined by the laws of another state, such stipulation being against public policy, and not binding upon the debtor. (Fidelity Sav. Association v. Shea, 405.)
6. SAME—ATTORNEY FEE.—In a suit upon a usurious contract, it is error to allow the plaintiff under the stipulations of a mortgage securing the debt an attorney fee, as such fee is no part of the debt. (Fidelity Sav. Association v. Shea, 405.)
7. EVIDENCE—USURY.—Evidence examined and found not to support the finding of the court that the notes and mortgage sued on were

USURY (Continued).

in violation of the usury laws of Idaho. See *Cornucell v. McCoy*, ante, p. 219, 55 Pac. 240, and *Cornwell v. Carter*, ante, p. 222, 55 Pac. 240, decided at this term. (*Cornwell v. Urton*, 269.)

8. **AGENCY — LOANING MONEY — INTEREST — COMMISSION — USURY.**—M. applied to plaintiff by a written application, wherein he appointed plaintiff his agent for the purpose, to procure for him a loan of \$600 for a period of five years, with interest at the rate of eight per cent per annum, payable annually. For his services in procuring said loan plaintiff charged M. a commission of ten per cent upon the sum so procured and loaned, M. and his wife giving to plaintiff their notes and mortgage to secure said sum. *Held*, that such charge for commission, in the absence of any proof showing that plaintiff was acting as the agent of party from whom said loan was procured, or that such party was interested in or received any part of the commission so charged, the same did not come within the provision of title 7, chapter 10, Revised Statutes of Idaho, and was not usurious. (*Cornwell v. McCoy*, 219; *Cornwell v. Carter*, 222.)
9. **USURY—RECOVERY OF PENALTY—DUTY OF COURT—APPEAL.**—When it is ascertained by the court that an action has been brought on a contract which provides for illegal interest under the provisions of section 1266 of the Revised Statutes, it is the duty of the court to render judgment as directed by said section, and if it fails to do so, the proper procedure on behalf of the state is to move within six months after the adjournment of the term at which such judgment was rendered for the modification of the erroneous judgment, and in case such motion is denied, an appeal lies to this court. (*State v. Eves*, 144.)
10. **SAME—STATE PARTY AGGRIEVED.**—In this case the state was a "party aggrieved," and was entitled to an appeal under the provisions of section 4802 of the Revised Statutes. (*State v. Eves*, 144.)

See Corporations, 4; Mortgages and Trust Deeds, 7.

VENEREAL DISEASE.

See Marriage.

VENUE.

CHANGE OF VENUE.—The granting of a change of venue in a criminal case is largely in the discretion of the trial court, and where such application is based solely upon the affidavit of the defendant, the action of the trial court in refusing a change of venue will not be interfered with. (*State v. St. Clair*, 109.)

VERDICT.

See Husband and Wife, 5; Trial, 5-7.

WATERS AND WATERCOURSES.

1. **WATER RIGHT—DITCH.**—One may own a ditch, without owning a water right and may protect it from injury. (*Stocker v. Kirtley*, 795.)
2. **APPROPRIATION OF WATER—PRIOR RIGHTS.**—The right of a prior appropriator of water cannot be defeated to any portion thereof, on the ground that he has by reason of a mistake as to the location of his boundary lines used a portion of such waters upon other land than his own. (*Mahoney v. Neiswanger*, 750.)
3. **SAME—FIRST IN TIME FIRST IN RIGHT—BENEFICIAL USE.**—Under the facts in this case, *held*, that the rights of plaintiff as prior locator have not been impaired by reason of his not having put the water appropriated by him to a beneficial use. The doctrine of *Hillman v. Hardwick*, 3 Idaho, 255, 28 Pac. 438, and *Conant v. Jones*, 3 Idaho, 606, 32 Pac. 250, affirmed. (*Mahoney v. Neiswanger*, 750.)
4. **APPROPRIATION OF WATER—FIRST IN TIME, FIRST IN RIGHT.**—In case of conflict between the appropriators of water in a given stream, that appropriation that is first in time, is first in right. The decision in *Hillman v. Hardwick*, 2 Idaho, 983, cited and approved. (*Dunniway v. Lawson*, 28.)
5. **WATER RIGHTS — APPROPRIATION OF WATER — JURISDICTION OF COURTS.**—In an action to settle the water rights of various parties upon a stream, the district court, after establishing the priorities of the various appropriators, proceeded to decree the times and the quantity which each appropriator was permitted to use of such waters, *held*, error, it not being the province of the court to dictate how or when the right acquired by the appropriator should be exercised, so long as such use was within the limits of his appropriation. (*McGinness v. Stanfield*, 372.)
6. **WRIT OF MANDATE—WATER FOR IRRIGATION—MAXIMUM RATE FOR—CONSTITUTION LAW—POWER OF LEGISLATURE.**—Under the provisions of section 6, article 16, state constitution, the legislature is prohibited from fixing reasonable maximum rates to be charged for water under sale or rental. Said section commands the legislature to provide, by law, the manner in which such rates may be established, and by necessary implication prohibits the legislature from fixing such rates. (*Wilson v. Perrault*, 178.)
7. **MINING DITCHES—APPROPRIATION OF WATER FOR MINING PURPOSES—PRIORITY.**—Plaintiffs' predecessors in interest located and appropriated one hundred and twenty-five inches of the waters of Elk creek, in 1863, and utilized the same for purposes of placer mining. In December, 1863, the predecessors in interest of defendants located and appropriated all the surplus or available water in Elk creek and tributaries (Deer creek included), and used the same for mining purposes through a ditch constructed

WATERS AND WATERCOURSES (Continued).

during 1864. During the year 1865, plaintiffs' predecessors constructed another ditch, with a capacity of five hundred inches of water, and connected the same with the first-named ditch by a flume across Elk creek, and also enlarged the first-mentioned ditch to a capacity of five hundred inches. *Held*, that, as against defendants, plaintiffs could only claim priority for one hundred and twenty-five inches of the water of Elk creek. The finding of the lower court against the claim of appellants for damages held to be sustained by the evidence. (*Branstetter v. Williams*, 574.)

8. DIVERTING WATER OF A NATURAL STREAM—LIABILITY OF CITY.—The waters of a natural stream flowed through the city, crossing ten streets therein, and, during high waters, flooded the streets, injuring them to the damage of the city. To avoid such injury, the city constructed an artificial canal, and diverted the waters of said stream therein; the canal was not of size sufficient to convey the waters of said stream, and overflowed and injured plaintiff's lands. *Held*, that the city was liable to plaintiff in damages, in being beneficially interested in the change of the course of a natural stream, and negligent in not constructing the canal of size sufficient to carry the waters of said stream at all times and in quantities that might be reasonably anticipated. (*Wilson v. Boise City*, 391.)
9. ARTIFICIAL WATERWAY—MUST BE KEPT IN REPAIR BY PARTY CONSTRUCTING IT.—One who purchases land and improves the same on the line of an artificial waterway constructed by a municipal corporation may well rely upon such municipal corporation to perform the duty that it is under, of keeping such artificial waterway in repair and condition to carry all of the waters that may flow therein from usual and ordinary causes, and may recover damages received by the negligent flooding of his lands by waters from such artificial waterway. (*Wilson v. Boise City*, 391.)

WILLS.

OLOGRAPHIC WILL—MARRIED WOMEN.—The statutes of Idaho do not empower a married woman to make an olographic will. (*Scott v. Harkness*, 736.)

WITNESSES.

1. PERSONS WHO CANNOT TESTIFY.—Section 5957 of the Revised Statutes of Idaho, subdivision 3, does not apply to an action brought to establish a trust. (*Nasholds v. McDonell*, 377.)
2. EVIDENCE—WITNESS ALLOWED TO EXPLAIN HIS TESTIMONY.—It is not error to permit a witness to make an explanation of statements made by him on the witness-stand or to permit him to correct any mistake he may have made in giving his evidence,

WITNESSES (Continued).

care being exercised to prevent such witness straying away from the issues, or making improper statements. (*Giffen v. City of Lewiston*, 231.)

3. **CROSS-EXAMINATION OF DEFENDANT.**—Under the provisions of section 6082 of the Revised Statutes, after the examination of a witness has been concluded, on both sides, the witness may be recalled by leave of court, for further examination. (*State v. Anthony*, 383.)
- 3a. **ROBBERY—CROSS-EXAMINATION.**—In the trial of a criminal action, as in this case a charge of robbery, the defendant should be permitted, upon cross-examination of prosecuting witness, to interrogate such witness as to any matters connected with the transaction. (*State v. Webb*, 428.)
4. **IMPEACHMENT.**—Under the facts of this case, it was error to compel the defendant to answer questions concerning an alleged attempt to debauch a child, which matter was not connected in the remotest degree with the crime for which the defendant was being tried. (*State v. Anthony*, 383.)
5. **IMPEACHMENT.**—The credibility of a witness may be impeached by proof that he has made statements relevant to the issues out of court, contrary to what he has testified to on the trial. (*State v. Anthony*, 383.)
6. **SAME.**—Under the provisions of section 6082 of the Revised Statutes, a witness may be impeached: 1. By contradictory evidence; 2. By evidence that his general reputation for truth, honesty or integrity is bad; but cannot be impeached by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that the witness has been convicted of a felony. (*State v. Anthony*, 383.)

WRIT OF REVIEW.

See Certiorari

WRIT OF PROHIBITION.

See Prohibition, Writ of.

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